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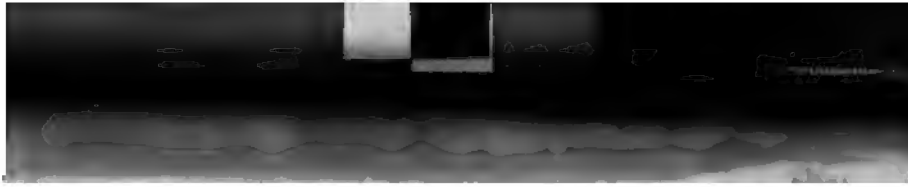
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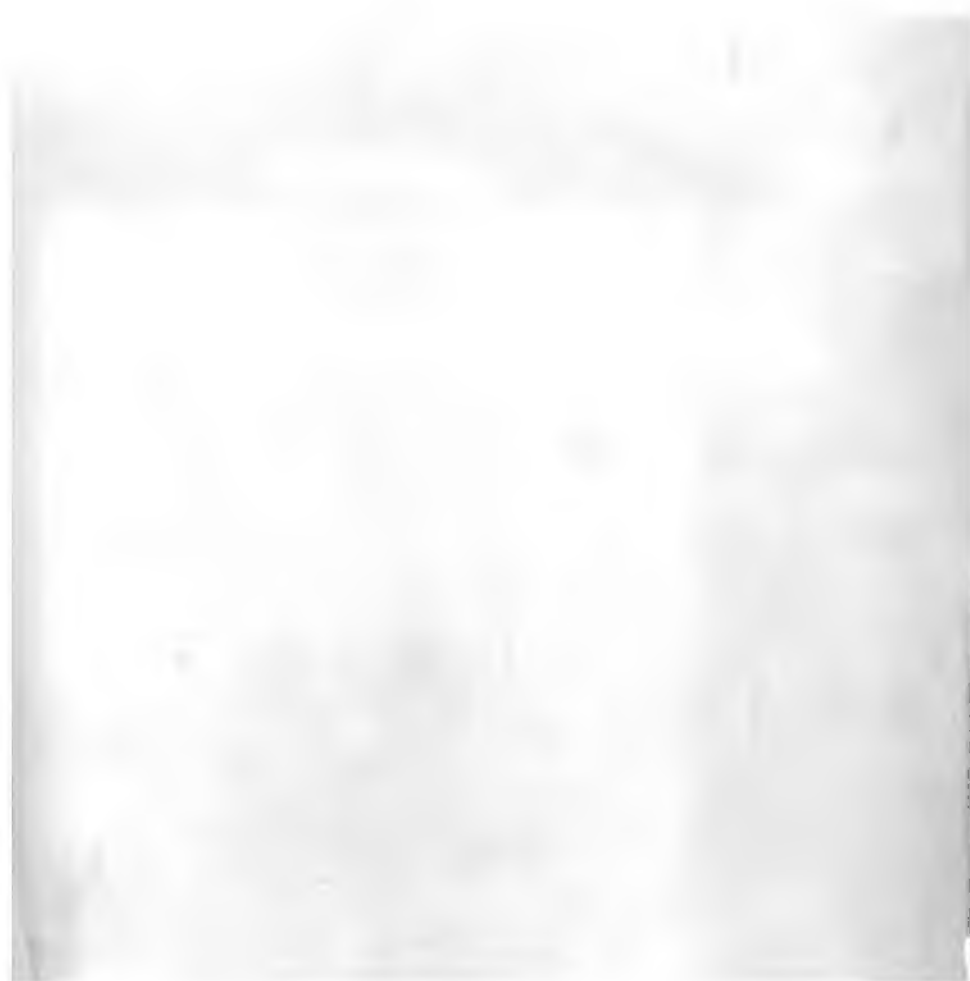
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# COMMON BENCH REPORTS.

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CASES ARGUED AND DETERMINED

IN

THE COURT OF COMMON PLEAS,

IN

TRINITY TERM AND VACATION, AND MICHAELMAS  
TERM, 1846, AND HILARY TERM, 1847;

WITH TABLES OF THE NAMES OF CASES ARGUED AND CITED,  
AND OF THE PRINCIPAL MATTERS.

---

BY

JAMES MANNING,  
SERJEANT AT LAW;

T. C. GRANGER,  
OF THE INNER TEMPLE, ESQ.  
BARRISTER AT LAW;

AND

JOHN SCOTT, OF THE INNER TEMPLE, ESQ.  
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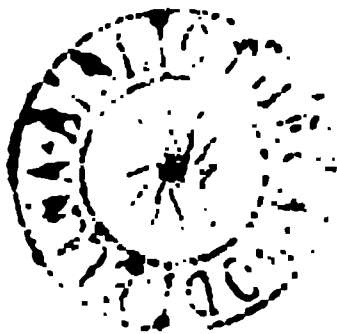
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**J U D G E S**  
**OF**  
**THE COURT OF COMMON PLEAS**  
**DURING THE PERIOD COMPRISED IN THIS VOLUME.**

---

**The Right Hon. Sir NICOLAS CONYNTHAM TINDAL,**  
**Knt., Ld. Ch. J.**  
**The Right Hon. Sir THOMAS WILDE, Knt., Ld. Ch. J.**  
**The Hon. Sir THOMAS COLTMAN, Knt.**  
**The Hon. Sir WILLIAM HENRY MAULE, Knt.**  
**The Hon. Sir CRESSWELL CRESSWELL, Knt.**  
**The Hon. Sir EDWARD VAUGHAN WILLIAMS, Knt.**

**ATTORNEYS-GENERAL.**

**Sir FREDERICK THESIGER, Knt.**  
**Sir JOHN JERVIS, Knt.**

**SOLICITORS-GENERAL.**

**Sir FITZROY KELLY, Knt.** :  
**Sir DAVID DUNDAS, Knt.** .







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# CASES

ARGUED AND DETERMINED

1846.

---

IN THE

COURT OF COMMON PLEAS,

AND

UPON WRITS OF ERROR FROM THAT COURT

TO THE

EXCHEQUER CHAMBER,

IN

Trinity Term,

IN THE NINTH YEAR OF THE REIGN OF VICTORIA.

---

The judges who usually sat in banco in this term, were,

TINDAL, C. J.

MAULE, J.

COLTMAN, J.

ERLE, J.

---

HOLDEN *v.* The LIVERPOOL New Gas and Coke  
Company.

May 22.

CASE. The declaration stated, that the plaintiff, before and at the time of the committing of the grievance by the said *Liverpool* New Gas and Coke Company, A gas company incorporated by act of parliament, with the usual powers to take up pavements, &c., for the purpose of laying down and repairing mains, pipes, &c., had for some years supplied gas to a house belonging to the plaintiff; the *only* means of shutting it off being by a stop-cock *within* the house, the key of which was kept by the occupier. The last tenant, on quitting, gave notice to the company that he should not require any further supply; and one of their workmen, at his request, removed a chandelier from one of the



1846.  
 ———  
 HOLDEN  
 v  
 The  
 LIVERPOOL  
 New Gas  
 Company.

Company as thereafter mentioned, was, and from thence hitherto had been and still was, lawfully possessed of a certain house, with the appurtenances, situate and being in the borough of *Liverpool*, in the county palatine of *Lancaster*; that, before and at the time of the committing of the said grievance, the said *Liverpool* New Gas and Coke Company was possessed of divers large quantities of a certain dangerous, inflammable, and explosive gas, then being under the care of the said *Liverpool* New Gas and Coke Company: yet the said *Liverpool* New Gas and Coke Company, well knowing the premises, but disregarding their duty in that behalf, and contriving and wrongfully and unjustly intending to injure and prejudice the plaintiff in the possession and enjoyment of his said house, and to injure the said house, theretofore, to wit, on the 1st of *April*, 1844, wrongfully and injuriously took such little and bad care of their said gas, that, by reason of the carelessness, negligence, and improper conduct of the said company in that behalf, divers large quantities of the said gas of the said company wrongfully and unlawfully then passed, diffused, and spread itself towards, unto, into, and about the said house of the plaintiff, and then caught fire, and exploded therein: by means of which premises the said house of the plaintiff was then greatly damaged, shaken, burnt, and injured, and then became and was out of repair and dilapidated, and the plaintiff was thereby prevented from enjoying the same, as he otherwise might have done and ought to have done, for

rooms, leaving the end of the pipe properly secured. The internal fittings were the property of the plaintiff. Whilst the house remained untenanted, the gas by some unexplained means escaped, and an explosion took place, by which the house was considerably damaged.

In case against the company, alleging a breach of duty on their part in not taking proper means to prevent the influx of the gas into the house, the judge having, upon the above facts, directed a nonsuit, the court declined to interfere.

Negligence on the part of the plaintiff, was held to be an admissible defence under the plea of not guilty.



a long time, to wit, six months then next following, and was also deprived of great gains and profits, to wit, 100*l.*, which he would have otherwise derived from letting the said house during the last-mentioned period, and was also forced and obliged to, and necessarily did, pay, lay out, and expend divers large sums of money, in the whole amounting to a large sum, to wit, 500*l.*, and was also forced and obliged to, and necessarily did, contract and become liable to pay divers other sums of money, in the whole amounting to another large sum, to wit, 500*l.*, in and about repairing the damage so done as aforesaid.

Pleas — first, not guilty — secondly, that the plaintiff was not possessed of the house in the declaration mentioned, *modo et formâ*. Issue thereon.

The cause was tried before *Cresswell*, J., at the last summer assizes at *Liverpool*. The facts that appeared in evidence were as follow: — The plaintiff was the owner of a dwelling-house in *Salisbury Street, Liverpool*; and, whilst in his own occupation, in the year 1826, he caused it to be supplied with gas from the works of the *Liverpool New Gas and Coke Company*, which was incorporated by act of parliament (a), with extensive powers for taking up pavements, &c., for the purpose of laying down and repairing their mains and pipes. (b) The mode of supplying gas to the different houses, was by an iron pipe from the main in the street, through the outer wall of the house, and thence through a meter, between which and the wall was a stop-cock, to admit or exclude the passage of the gas to the meter and thence to the burners, at the pleasure of the occupiers, in whose possession the key of the stop-cock was. It appeared that the company had no

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(a) 4 G. 4. c. xxxix.

(b) The 49th section enacted that it should be lawful for the company of proprietors to dig

and sink trenches and drains, and to lay pipes, and put and affix stop-cocks and plugs, &c.



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external means of cutting off the gas from the houses supplied by them, except by the removal of the pipes from the main; stop-cocks on the outside of the houses having been disused since meters were first introduced, which was before the company in question was formed. Two persons in the employ of other gas companies — the one at *Liverpool*, the other at *Manchester* — were called to prove that the course usually adopted by them, with regard to empty houses, was, to intercept the supply by means of stop-cocks on the *outside*, or by taking up the pavement and removing the pipes: but, on cross-examination, it appeared that these two companies were established before the meter had come into general use.

In *October*, 1831, the plaintiff ceased to reside in the house in *Salisbury Street*; since which time it had been in the occupation of several tenants in succession; the company continuing to supply gas to such tenants down to the time of the happening of the accident hereinafter mentioned. Mr. *Withnell*, the last tenant, who entered at *Lady-day*, 1842, quitted at *Lady-day*, 1844, previously to which day, he gave notice to the company that he was about to vacate the premises, and would not be liable for any further supply of gas thereto. At the time *Withnell* quitted the house, a workman in the employ of the company, at his request, and by the direction of the company's foreman, went there for the purpose of taking down a chandelier in the dining-room, and a lamp in the hall, which were the property of *Withnell*, and which were carried to and fixed by the company in the house to which *Withnell* had removed. This person, when he unfixed the chandelier and lamp, properly secured the ends of the pipes with metal caps screwed on with white lead, and left all safe. The stop-cock and meter used in the house in question, were the property of the plaintiff.

On the 8th of *April*, by some unexplained means,



nothing having previously occurred to indicate danger (*a*), an explosion of gas took place in the plaintiff's house, which occasioned considerable damage thereto. Upon a subsequent examination of the premises, it appeared that the gas was *turned on*, and that the internal supply pipes had been torn or cut from the meter, and carried away. How this had occurred, there was no evidence to shew ; but it was assumed to have been the act of some person who had feloniously entered the house after *Withnell*, the last tenant, had quitted it.

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It was contended, on the part of the plaintiff, that it was the duty of the company, upon the receipt of a notice from the tenant that he no longer required the gas, to take effectual means to prevent it from entering the house; that, after such notice, they had no right to send their gas upon the premises; and that, if for the purpose of prevention, it was essential that there should be a stop-cock outside the house, they were bound by law to provide it.

The learned judge,—conceiving that no such duty was cast upon the defendants, but that it was the duty of the landlord, or of the outgoing tenant, who had the means of controlling the influx of the gas, by the internal stop-cock, to see that it was properly turned off,—directed a nonsuit. “I have always,” observed his lordship, “understood it to be a principle applicable to actions for negligence, that there should be no negligence or want of reasonable caution on the part of the plaintiff. In this case, the tenant of the house must for this purpose

(*a*) It was in evidence, that the occupier of the adjoining house, between seven and eight o'clock in the evening of that day, being annoyed by a smell of gas on his own premises (of which he had given immediate notice to the company, request-

ing them to send some one *next day* to ascertain whence it escaped), went to the cellar for the purpose of turning off his own supply, having a lighted candle with him ; and that the explosion in the plaintiff's house took place at that instant.



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be identified with the plaintiff himself, who must be responsible for not taking care that the stop-cock inside the house was properly turned. (a) Inasmuch, therefore, as the plaintiff's own negligence in leaving the stop-cock open, undoubtedly contributed in a material degree to the accident — or, indeed, entirely occasioned it — I think the action cannot be maintained."

Sir *T. Wilde*, Serjt., in *Michaelmas* term last, obtained a rule nisi for a new trial, against which

*Channell*, Serjt. (with whom was *Crompton*), shewed cause. The defendants have been guilty of no negligence. They had no control over the pipes in the plaintiff's house; nor is there any thing in the act of parliament by which they are incorporated, that imposes upon them any such duty as that with which it is sought to charge them in this action. The notice given to them by the tenant was intended merely to intimate to them that they were not to charge *him* for any further supply of gas to those particular premises: it was not a notice to them to remove the pipes. The internal fittings being the property of the plaintiff, it was *his* duty to have some one to take care of the house, and to see that the stop-cock, which was solely under *his* control, was properly turned. He has, therefore, at all events, been so far contributory to the injury of which he complains, as to preclude him from charging the defendants. The case falls precisely within the rule of law laid down by *Parke*, B., in *Bridge v. The Grand Junction Railway*

(a) If the defendants had called witnesses, this difficulty would, in all probability, have been obviated; for, it can hardly be supposed that their workman, — who would have

been called to prove that, on removing the chandelier and lamp, he properly secured the *ends* of the pipes, — when he did so, neglected to turn off the gas at the meter.



*Company.* (a) That was an action upon the case for the negligent management of a train of railway carriages, whereby it ran against another train, in one of the carriages of which the plaintiff was riding, and injured him. The defendants pleaded that the parties having the management of the train in which the plaintiff was, managed it so negligently and improperly, that, in part by their negligence, as well as in part by the negligence of the defendants, the defendants' train ran against the other, and caused the injuries to the plaintiff. The plea was held bad, both in form and in substance — in form, because it amounted to not guilty — and in substance, because it did not shew, not only that the parties under whose management the train in which the plaintiff rode were guilty of negligence, but also that by ordinary care they could have avoided the consequence of the defendants' negligence. And *Parke, B.*, said: "All the facts in the plea may be true; there may have been negligence in both parties; and yet the plaintiff may be entitled to recover. The rule of law is laid down with perfect correctness in the case of *Butterfield v. Forrester* (b); and that rule is, that, although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendants' negligence, he is entitled to recover: if, by ordinary care, he might have avoided them, he is the author of his own wrong. That is the only way in which the rule as to the exercise of ordinary care, is applicable to questions of this kind."

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Sir *T. Wilde, Talfourd*, and *Manning*, Serjts. (with whom was *John Henderson*), in *Hilary* and *Easter* terms,

(a) 3 *M. & W.* 244. S. C.  
 per nom. *Armitage v. The*  
*Grand Junction Railway Com-*  
*pany*, 6 *Dowl. P. C.* 340.

(b) 11 *East*, 60.



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(b) 11 East, 60.



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were heard in support of the rule. The defence now relied on was not admissible under the pleas here pleaded. In *Milman v. Dolwell* (a), to trespass for unmooring the plaintiff's barge, the defendant, having pleaded merely the general issue, was not permitted to give in evidence that he removed it from a situation of danger by the plaintiff's authority; or that, being frozen to the barge of a third person which the defendant was authorised to remove, the one was inevitably unmoored with the other, and that they were both brought together to a place of safety. So, in *Knapp v. Salisbury* (b), it was held, that, in trespass for running with a cart against the plaintiff's chaise, the defendant could not give in evidence, under not guilty, that the chaise and cart were travelling on the high road in opposite directions, and that the collision happened from the negligence of the plaintiff, or from inevitable accident. And in *Webb v. Page* (c), under a plea of not guilty to a declaration in case against a carrier for hire, for not safely conveying goods, it was held that the defendant could not set up that the goods were lost through the negligence of the plaintiff. The doctrine laid down by Lord *Ellenborough* in *Butterfield v. Forrester* (d), — and recognised by this court, though with little discussion, in *Marriott v. Stanley* (e), — cannot be sustained to its full extent, and is inconsistent with the subsequent case of *Smith v. Dobson*. (g) There, in an action for improperly navigating a steam-boat, whereby the plaintiff's barge was sunk, it appeared that a large steam-vessel preceded the defendant's steam-boat, and partly occasioned the swell which caused the injury, and also that the plaintiff's barge was improperly trimmed and in-

(a) 2 *Campb.* 378.(b) 2 *Campb.* 500.(c) 6 *M. & G.* 196., 6 *Scott*,  
*N. R.* 951.(d) 11 *East*, 60.(e) 1 *M. & G.* 568., 1 *Scott*,  
*N. R.* 392.(g) 3 *M. & G.* 59., 3 *Scott*,  
*N. R.* 336.



sufficiently manned. The jury found a verdict for a fourth part of the damage actually sustained, alleging as a ground for so doing, that blame was not attributable to the defendants alone, the barge not being properly trimmed: and it was held, that, although this allegation might have been a reason for directing the jury to reconsider their verdict, it furnished no ground for granting a new trial. [*Cresswell*, J. That is not necessarily inconsistent with the doctrine of *Butterfield v. Forrester*. *Maule*, J. In the Admiralty court, if two ships have come into collision without fault on either side, or with an equal degree of negligence on the part of those in charge, the owners of each are made to bear the costs of repairs in equal proportions.] In *Lynch v. Nurdin* (a), the defendant negligently left his horse and cart unattended in the street: the plaintiff, a child seven years old, got upon the cart in play; another child incautiously led the horse on; and the plaintiff was thereby thrown down and hurt: and it was held, that the defendant was liable in an action on the case, though the plaintiff was a trespasser, and contributed to the mischief by his own act; and that it was properly left to the jury to say whether the defendant's conduct was negligent, and the negligence caused the injury. Lord *Denman*, C. J., in delivering the judgment of the court in that case, says: "The legal proposition, that one who has by his own negligence contributed to the injury of which he complains, cannot maintain his action against another in respect of it, has received some qualifications. Indeed, Lord *Ellenborough's* doctrine in *Butterfield v. Forrester*, which has been generally adopted since, would not set up the want of a superior degree of skill or care as a bar to the claim for redress: ordinary care must mean that degree of care

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(a) 1 Q. B. 29., 4 P. &amp; D. 672.



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which may reasonably be expected from a person in the plaintiff's situation: and this would evidently be very small indeed in so young a child. But this case presents more than the want of care: we find in it the positive misconduct of the plaintiff an active instrument towards the effect. We have here express authorities for our guidance. In *Ilott v. Wilkes* (a), a decision which excited great attention both in *Westminster Hall* and beyond it, this court, indeed, held that a trespasser in a wood where he well knew spring-guns to be placed, could not sue for the injury received by him from the explosion of one of them. But Lord *Tenterden* and his three brethren cautiously and repeatedly declared that their opinion was founded on the plaintiff's knowing of the danger, and voluntarily incurring it. *Best, J.*, who was supposed to carry to the greatest extent the right of protecting property against invaders by placing dangerous instruments, took infinite pains, when chief justice of the Common Pleas, to explain that his opinion in *Ilott v. Wilkes* rested exclusively on the notice. In *Bird v. Holbrook* (b) his expressions are most remarkable. And so far is his lordship from avowing the doctrine that the plaintiff's concurrence in producing the evil debars him from his remedy, that he considers *Ilott v. Wilkes* an authority in favour of the action." In the present case, the evidence clearly established a *prima facie* case of negligence against the defendants. They are a company incorporated for their own benefit, with ample powers in derogation of the rights of the public; having under their management and control a dangerous and insidious fluid, which it was their duty so to deal with, by all reasonable means in their power, as to guard against the possibility of injury to the public. Their right to let in this inflammable gas to the plain-

(a) 3 B. & Ald. 304.

(b) 4 Bingham 628.



tiff's house was co-extensive only with the term for which their customer held it. The moment they received notice from him that he no longer required to be supplied with gas at that place, the company's right to introduce it there ceased, and it became their duty to prevent its influx therein. [*Tindal*, C. J. The evidence shews that there is a stop-cock inside the house, under the control of the owner or occupier, and that the internal fittings are the property of the plaintiff: was no duty cast upon him to protect himself?] If there was evidence that the plaintiff had been guilty of negligence that was in any degree conducive to the injury complained of, that should have been submitted to the jury. There was, however, nothing to shew that there had been any want of due caution on his part; and he clearly cannot be held responsible for the acts of persons who might furtively and without his consent or privity have come upon the premises. The company were bound to furnish themselves with adequate means to intercept the supply from the outside of the house, if the safety of the public required it. In *Daniels v. Potter* (a), it was ruled by *Tindal*, C. J., that a tradesman who has a cellar opening upon the public street, is bound, when he uses it, to take reasonable care that the flap of it is so placed and secured, as that, under ordinary circumstances, it shall not fall down; but, if the tradesman has so placed and secured it, and a wrongdoer throws it over, the tradesman will not be liable in damages for any injury occasioned by it. In *Beaulieu v. Finglam* (b), which was an action on the case against the defendant for so negligently keeping his fire that the plaintiff's houses, and his goods therein, were burnt, *Markham* (Justice of C. P.) says: "I shall answer to my neighbour for him who enters into my

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(a) 4 C. & P. 262.

(b) P. 2 H. 4, fo. 18, pl. 6.



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house with my leave or with my knowledge, or who is a guest with me, or for my servant, if he or any of them does any thing, as with a candle or other thing, by which doing the house of my neighbour is burnt. But, if a man out of my house, against my will, puts fire into the straw of my house or elsewhere, whereby my house is burnt, and the houses of my neighbours are burnt, of that I shall not be bound to answer to them, &c., for that cannot be said to be by malfeasance (a) on my part, but against my will." And in the *Year Book*, H. 33 H. 6, fo. 1, pl. 3, (which was debt against the marshal of B. R. for the escape of persons set free by *Jack Cade*), *Choke*, Serjt. (b), says : " If a *stranger* comes into my house, and by his folly sets it on fire, so that other houses of my neighbours are burnt, I shall not be charged with the burning of my neighbours' houses." Here, the defendants *primâ facie* are wrongdoers. They had no right, by the unauthorized introduction of their gas into the plaintiff's house, to impose upon him the exercise of any degree of care.

*Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

The plaintiff in this case having been nonsuited on the trial of the cause before my brother *Cresswell* at the *Liverpool* assizes, a rule to shew cause was granted why such nonsuit should not be set aside and a new trial had, on the ground of misdirection.

The declaration stated that the plaintiff was possessed of his house, and the defendants possessed of large quantities of dangerous gas; yet the defendants took so little and such bad care of the gas, that it passed into the house and exploded, and damaged the plaintiff's

(a) *Par male.*

(b) Afterwards Chief Justice of C. P.



house: and, upon the issue of not guilty, the learned judge ruled, on the evidence brought forward, that the injury was not occasioned by the breach of any duty cast by law on the defendants, and directed the plaintiff to be called. And we think, upon the facts proved at the trial, such direction was right.

The plaintiff was the owner of the house, which had been let out to successive tenants, the last of whom had been in possession for about two years; the house having been supplied with gas by the defendants during the whole time of his tenancy, by means of pipes and fittings which had been put up and fixed within the house at the expense of the plaintiff, the landlord, and which were his property. The last tenant had quitted the house about ten days before the explosion took place, and, previously to his quitting, he had given notice to the company that no further supply would be wanted by him, and had requested them to remove a lamp in the drawing-room which was his property, which had been accordingly done by their servants on the 28th of *March*, when the pipe which fed the lamp was left properly capped, and when there was no smell of gas in the house. No explanation was given as to the mode in which the escape of the gas, or the explosion, which took place on the 8th of *April*, was occasioned; but it might fairly be inferred that the inside pipe, between the gas-meter and the burner, had been broken or cut by some wrong-doers who had entered the house whilst it was empty, during the interval between the two days above mentioned.

The mode by which the gas was supplied to the house, was by a pipe from the company's main in the street, which passed through the outer wall into the meter, and from thence supplied two lamps in the house, by feeders, with proper stop-cocks at the mouth of each. There was a stop-cock to the pipe between

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the inside of the wall and the meter, of which the tenant had the key, and could thereby either stop the gas entirely, or admit it for such time as was required. But the company had no stop-cock to the pipe on the outside of the wall.

On the part of the plaintiff, it was contended that it was the duty of the defendants, — upon notice by any tenant of a house that the supply of gas was no longer wanted, — to turn off the gas immediately from the house; that they had no right to introduce the gas into the house after such notice; and that, if an outer stop-cock in the street was absolutely necessary for turning off the gas, it was their duty to have provided such stop-cock accordingly. And, undoubtedly, if such duty was cast by law on the defendants, the direction of the learned judge was wrong, for no such outer stop-cock was provided.

But, upon looking at the act under which this company was formed, no such direction appears to be given to the company by the legislature; although it appeared in evidence that a different company formed for the supply of gas in the same town, had in fact made use of outer stop-cocks in the street. And we have no authority, as it appears to us, to say, that, as the legislature is silent on this point, the common law would impose this precise duty on the defendants, or any other duty than that which is expressed in the declaration, namely, the general duty of using proper and sufficient care in the supply of gas.

Now, looking at the liability of the defendants in this point of view, it appears to us that the injury sustained by the plaintiff is not solely imputable to the want of due care on the part of the defendants, but that the plaintiff has, by his own voluntary act, been contributory to it himself. The plaintiff knew that the pipe which brought gas into the house, still remained as



before, with the stop-cock in the inside of the house, which would prevent the gas being supplied to the house if properly turned; and the house, being without a tenant, was under his own charge and care. We think, therefore, the plaintiff was himself wanting in the ordinary care of seeing that the stop-cock in the inside was closed, which would have effectually prevented the gas from escaping. And this defence appears to us to have been clearly admissible under the general issue, according to the decision in *Bridge v. The Grand Junction Railway Company*. (a)

We therefore think the nonsuit right, and that the rule for setting it aside must be discharged.

Rule discharged.

(a) 3 *M. & W.* 244., *S. C.* 6 *Dowl. P. C.* 340. There the court held the plea to be clearly bad, independently of the question whether the defence could be given in evidence under the general issue. The cases of *Millen v. Hawery*, *Latch*, 13., and *Knapp v. Salisbury*, 2

*Campb.* 500., and *Com. Dig. Pleader* (3 *M.* 31.), were cited.

And see *Gibbon v. Pepper*, 2 *Salk.* 637., 1 *Lord Raym.* 38., 4 *Mod.* 404.; *Smith v. Dobson*, 3 *M. & G.* 59. 62. n.; *Webb v. Page*, 6 *M. & G.* 196.; *Norton v. Schofield*, 9 *M. & W.* 665.

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POWLES, one of the Public Officers of The  
LIVERPOOL Banking Company, v. PAGE.

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*A., B., C., and D., who carried on business under the firm of G., P., & Co., in 1840 opened an account with a banking company established under the 7 G. 4. c. 46., 1 & 2 Vict. c. 96., and 5 & 6 Vict. c. 85. In 1842, A. retired from the firm, but this fact was not advertised in the London Gazette, nor was any alteration made in the pass-book:*

*Held, that the mere fact of D., one of the firm of G., P., & Co., being also a director*

*of the banking company (but having as such no share in the management of or interference in the banking accounts), did not amount to notice, — actual or constructive, — to the bank, of the dissolution, so as to discharge A. in respect of a debt subsequently accruing, a banking company so established, differing in this respect from an ordinary trading partnership.*

**A**SSUMPSIT, to recover the sum of 2400*l.* 1*s.* 4*d.*, with interest from the 7th of *November*, 1843, being the balance of a banking account. The declaration contained counts for work, and labour, and commission, and the usual money counts.

The defendant pleaded — first, non assumpsit; secondly, payment; thirdly, that the defendant was sued as one of a co-partnership, trading under the name of *Grantham, Page & Co.*, consisting of the defendant, *John Grantham, John Philips Mather*, and *William Dixon*, and that the said co-partnership had a set-off against the banking company; fourthly, that the defendant retired from the said co-partnership, which was thenceforth carried on under the firm of *John Grantham & Co.*, and that there was an agreement between all the members of the firm of *Grantham, Page & Co.* and the banking company, that the banking company should accept the firm of *John Grantham & Co.* as their debtors for the sum due from *Grantham, Page & Co.*, and exonerate and discharge the defendant from all liability for such sum, and that such agreement was performed; fifthly, as to 3177*l.* 6*s.* 4*d.*, accord and satisfaction, by the delivery of two bills of exchange, amounting to that sum.

The replication joined issue on the first plea, traversed



the second and third pleas, and the agreement and performance of it mentioned in the fourth plea, and the agreement to accept, and the receipt of, the bills mentioned in the last plea. Issue on the traverses.

The particulars of demand comprised all the items on the debit side of the account of *Grantham, Page, & Co.*, from the opening to the closing of their account with the bank.

The cause came on to be tried before *Tindal, C. J.*, at the sittings for *London* after *Hilary* term, 1844, when a verdict was found for the plaintiff, subject to the opinion of the court upon the following case: —

The plaintiff is one of the public officers of The *Liverpool* Banking Company, carrying on business at *Liverpool* under the 7 G. 4. c. 46., and, in that capacity, sues the defendant for the balance of a banking account, alleged to be due to the bank from the defendant and his late partners, who traded in *Liverpool* under the firm of *Grantham, Page, & Co.* The partnership was created by parol, and for no definite period: and it is alleged by the defendant to have been dissolved, as to him, on the 6th of *January*, 1842, as after mentioned.

The firm consisted of four persons, viz. the defendant, *John Grantham*, *John Philips Mather*, and *William Dixon*, and carried on the business of iron-boat builders, in *Liverpool*. *John Grantham* was the party who usually transacted business with the bank. When the account of *Grantham, Page, & Co.* was opened, it was understood that *Grantham* alone was to draw the cheques; the defendant on several occasions being present when *Grantham* drew cheques in the name of the firm, and occasionally accompanying him to the bank. The defendant, who was a skilful artisan — but could neither read nor write — had the principal management of the works. The account of *Grantham, Page, & Co.* was opened on the 4th of *February*, 1840. On the 2nd of *July*, 1842, a separate account was opened in another

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1846. pass-book between the bank and the firm of *John Gran-*  
 ——— *tham & Co.*, which consisted of all the members of the  
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The firm of *John Grantham & Co.* failed in *July*, 1843, at which period they owed the bank the sum of 3000*l.*, which was independent of the amount of the two bills of exchange accepted by *John Grantham & Co.* on account of the balance due from *Grantham, Page, & Co.*, as hereinafter stated.

There was also a firm of *Page* (the defendant) & *Grantham* (which was dissolved in *June*, 1842, a notice of the dissolution of which appeared in the gazette on the 5th of *July*, 1842), and another firm of *Mather, Dixon, & Grantham*, who carried on business in *Liverpool* as iron-founders and steam-engine makers, and, after *June*, 1842, as boiler-makers, having succeeded to the business of *Page & Grantham*, after the dissolution of that firm: but they had no account with the bank. The *Grantham* appearing as a member of those firms, was the same *Grantham* who was a member of the firms of *Grantham, Page, & Co.*, and *John Grantham & Co.*

On the 31st of *December*, 1841, the balance due to the bank from the firm of *Grantham, Page, & Co.* was 1334*l.* 5*s.* 1*d.*; and between the 6th of *January* and the 15th of *April*, 1842, there had been payments into the bank to the amount of 1700*l.*; but sums to an equal or larger amount had been from time to time drawn out: and the bank, during the same period, continued paying the acceptances of *Grantham, Page, & Co.* which had been given and dated prior to the 6th of *January*, 1842; and all the bills so paid were entered in the pass-book of *Grantham, Page, & Co.* No proof was given that *Grantham*, on paying the last-mentioned sums so amounting to 1700*l.* into the bank, directed them to be appropriated to the discharge of any particular items.

The balance appearing due in the pass-book, — which



was produced by the defendant on the plaintiff's requisition, and given in evidence by the plaintiff, — from *Grantham, Page, & Co.*, on the 30th of *June*, 1842, was 2857*l.* 6*s.* 2*d.*, which, with the additional advance of the 155*l.* after mentioned, and interest and commission, amounted, on the 31st of *December*, 1842, to 3177*l.* 6*s.* 4*d.* The usage of the bank was, to balance all customers' accounts half-yearly, on the 31st of *December* and the 30th of *June*.

Frequent applications had been made by the bank to *Grantham*, as a member of the firm of *Grantham, Page, & Co.*, in the year 1842, to reduce the balance due to the bank from that firm; and, on being threatened with legal proceedings in *December*, 1842, unless the balance were liquidated, he wrote requesting a small advance of money from the bank to enable the firm to pay their workmen's wages, and promising to make arrangements to liquidate the balance then due. At an interview between *Grantham* and Mr. *Wilson*, the manager of the bank, the latter complained that the firm of *Grantham, Page, & Co.* were, by not liquidating their account, holding a portion of the capital of the company in suspense, which could not be allowed; on which *Grantham* proposed to give the bank two bills drawn by *Mather, Dixon, & Co.*, upon, and accepted by, *John Grantham & Co.*, on account of the balance then due to the bank, stating that by the time those bills should have become due the funds of *Grantham, Page, & Co.* could be collected, so as to meet the bills. *Wilson* agreed to receive such bills, at five, six, or seven months, as might be convenient. It was not proposed by *Grantham* to discharge *Page*; nor was any proposal to that effect ever made, either before or after the giving of the bills. The bills were delivered to the banking company on the 13th of *January*, 1843, and were made payable at Messrs. *Currie & Co.*, bankers, the *London* correspondents of the *Liverpool Banking Company*. These bills were agreed

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to be drawn for the balance of the banking account, with interest for the time they had to run ; but there was a slight miscalculation as to the amount. The first of the two bills was dated the 2nd of *January*, 1843, drawn by the firm of *Mather, Dixon, & Grantham*, upon, and accepted by, the firm of *John Grantham & Co.*, and due on the 5th of *June*, 1843, for 1587*l.* 6*s.* 4*d.* The second was drawn and accepted by the same parties, dated on the 2nd of *January*, 1843, and due on the 5th of *August*, 1843, for 1590*l.* The first bill was negotiated by the bank ; but it was retired by the bank, who, when it became due, paid it, having previously taken a renewal, at the request of *John Grantham*, who made no communication upon the subject to the defendant. The renewed bill was also dishonoured, as also was the second of the above bills, viz. that for 1590*l.* due on the 5th of *August*, 1843. On the 8th of that month, above a month after the failure of the firms of *John Grantham & Co.*, and *Mather, Dixon, & Co.*, *Wilson* wrote to the defendant, informing him of the dishonour of the bills, and telling him that the bank would hold him liable for the amount due to them from the firm of *Grantham, Page, & Co.* In consequence of this letter, the defendant a few days afterwards called on *Wilson*, at the bank, and told him that the firm of *Grantham, Page, & Co.* had been dissolved, and that the defendant was consequently not liable ; to which *Wilson* replied, that, though they had dissolved partnership, he must pay the debts of the partnership : the defendant represented that his case was a hard one ; to which *Wilson* replied that he was sorry for it, but his duty to the bank prevented his taking that into his consideration.

The firm of *Mather, Dixon, & Co.*, having stopped payment early in *July*, 1843, entered into a composition with their creditors, and paid a dividend of 5*s.* in the pound : and the bank, in pursuance of an agreement with *Page*, the defendant (which accompanied and was



to be considered as part of the case), entered into the composition deed, and received under the composition deed the sum of 794*l.* 19*s.* 4*d.*; and the balance claimed by the bank in this action, after deducting that amount, remains unpaid. Two further sums of 2*s.* and 1*s.* in the pound have been paid since this action was tried. Interest is claimed by the banking company on the balance due, from the 31st of *December*, 1844, after giving credit for the above-mentioned two dividends.

On the 6th of *January*, 1842, — by agreement and arrangement between the defendant and his former partners, *John Grantham*, *John Philips Mather*, and *William Dixon*, early in the same month, that the defendant should quit the firm of *Grantham, Page, & Co.*, — the following memorandum, signed, at the office of *Grantham, Page, & Co.*, by the said *John Grantham*, *John Philips Mather*, and *William Dixon*, was delivered to the defendant, and accepted by him : —

“ *Liverpool*, 6th *January*, 1842.

“ *Mr. John Page*, — We hereby release you from the partnership which existed between us and you in the iron-ship building yard, carried on under the name of *Grantham, Page, & Co.* In consideration of your giving up all claim to the property belonging to the said establishment, we hereby engage to pay you the sum of 200*l.* at the expiration of two years from this date.

(Signed) “ *John Grantham.*  
 “ *John P. Mather.*  
 “ *William Dixon.*”

This was the only document that was executed between the parties. The above 200*l.* has never yet been paid; but, early in *July*, 1842, the defendant came to the bank in company with *Grantham*, and paid in 500*l.* in cash and some bills to his private account, saying that

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they were a portion of what had been repaid to him from the firm of *Grantham, Page, & Co.*

Shortly after the above memorandum had been signed, the style of the firm of *Grantham, Page, & Co.*, was altered to "*John Grantham & Co.*," in the cards and invoices; and the name of *Page* was in the same month of *January*, 1842, blacked out from the inscription "*Grantham, Page, & Co.*," over the door where the business of the firm was carried on. No notice of the dissolution appeared in the gazette, nor was any balance struck in the partnership accounts; nor was any account taken of *Grantham, Page, & Co.*; nor was any change ever made in the pass-book of *Grantham, Page, & Co.*, to *Grantham & Co.* The last cheque on the banking company drawn by *John Grantham* in the name of *Grantham, Page, & Co.*, was drawn on the 2nd of *July*, 1842, for 55*l.*, and was paid by the bank.

*Dixon*, one of the partners of the firm of *Grantham, Page, & Co.*, was also a holder of thirty shares in the *Liverpool Banking Company*, and a member of the general board of directors from *March*, 1841, till *April*, 1843, and attended the weekly meetings of the directors; but his being a director gave him no management of, or interference in, the banking accounts, which, together with the business of the bank, were managed by *Wilson*, (who was not a shareholder), with the concurrence of three managing directors, of whom *Dixon* was not one. *Dixon* never mentioned to any of the directors of the bank that the firm of *Grantham, Page, & Co.* had been dissolved, or that *Page* had retired.

On the 15th of *April*, 1842, a bill for 1000*l.*, drawn by *John Grantham & Co.*, was paid into the banking company.

The defendant contended, at the trial, that *Dixon's* knowledge of the alleged dissolution of the firm of *Grantham, Page, & Co.*, operated as notice to the



banking company. No question of fact was submitted to the jury; but it was agreed that the court should have the power to draw any inference which a jury might have drawn, and should direct how the verdict should be entered; and, if for the plaintiff, for what amount.

Copies of the pleadings, and of the pass-book of *Grantham, Page, & Co.*, and the agreement above mentioned, accompany, and are to be considered as part of, the case, and to be referred to accordingly.

The questions for the opinion of the court are,—whether the verdict should be entered for the plaintiff or the defendant, and on what issues; and, if for the plaintiff, for what amount.

*Channell*, Serjt. (with whom was *Warren*), for the plaintiff. (a) The case that will be presented on the part of the defendant, is, that there was, on the 6th of *January*, 1842, such a dissolution of the partnership of *Grantham, Page, & Co.*, with notice of that fact communicated to the bank, as to exonerate the defendant from all subsequent liability; and that the balance then due from *Grantham, Page, & Co.*, to the bank, has been discharged by the payments subsequently made. It may be conceded that the memorandum of release given to the defendant by *Grantham, Mather, and Dixon*, would, as between themselves, discharge the former: but it can have no operation to prevent the plaintiff from recovering a

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(a) The points marked for argument on the part of the plaintiff were:—That the special case disclosed no evidence of notice to the *Liverpool Banking Company* of the alleged dissolution of the firm of *Grantham, Page, & Co.*, the knowledge of such supposed fact by *Dixon*, under the circumstances stated, not amounting in law to

notice thereof to the company; that none of the defendant's pleas were supported by the facts set forth in the special case; and that the plaintiff was entitled to have the verdict entered generally for him, for the balance of 2400*l.* 1*s.* 4*d.*, and interest, subject to the deduction mentioned in the special case.



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debt then due from the firm to the bank, or a debt subsequently accruing (there having been no notification of the dissolution of the partnership in the gazette), unless the bank had otherwise notice of the fact. The way in which it is sought to fix the bank with notice that the defendant had ceased to be a member of the firm of *Grantham, Page, & Co.*, is, by shewing that *Dixon*, one of the partners, was a shareholder in the bank, and one of the directors. The case, however, states, that *Dixon*, as such director, had no share in the management of the banking accounts; and there is no evidence to shew that *Dixon's* knowledge was communicated to the bank. The statute 1 & 2 Vict. c. 96. s. 1. (made perpetual by the 5 & 6 Vict. c. 85.), which empowers banking co-partnerships to sue and be sued in the name of one of their public officers, has the effect of making them *quasi* corporations. Knowledge of an individual shareholder or member does not, as in the case of an ordinary partnership, affect the body. In *Hill v. The Manchester and Salford Waterworks Co. (a)*, by a clause in the act of parliament incorporating the company, it was enacted that the clerk should, in a book provided by the company, keep an account of all acts, proceedings, and transactions of the company, and that every proprietor should have liberty to inspect the same, and take copies of the entries; and it was held that entries of the proceedings in the book so kept by the clerk, were not admissible in evidence on behalf of the company against one of their own members suing them; Lord *Denman*, C. J., observing, that “a proprietor entering into a contract with the company, must be deemed a stranger, and can be affected by no entry made under orders from the entire body.” So, in *Dunston v. The Imperial Gas Light and Coke Company (b)*, which was an action

(a) 5 B. & Ad. 866., 2 N. & M. 573. (b) 3 B. & Ad. 125.



by assignees of a bankrupt for certain fees alleged to be due to the bankrupt for his attendance as a director of the company, *Parke, B.*, said: "As to the objection that the bankrupt in this case was a member of the corporation, and therefore could not sue them; a member of a corporation is, for this purpose, as distinct from the corporate body as any third person." If that be so with regard to a contract, it must equally be so with reference to notice or knowledge. The case of *Steward, Public Officer of the East of England Bank v. Dunn, Public Officer of the Southern District Banking Company (a)*, is more immediately applicable. There, in an action by one banking company against another, it was sought to affect the plaintiff with notice of a fact, by reason of its being known to two individuals who were members of both companies: and *Parke, B.*, said: "It is argued that two members of the plaintiff's company knew of this regulation. I am inclined to think, however, that this objection is removed by the 1 & 2 *Vict. c. 96*. Since that act, a company of this kind is in the nature of a corporation, not an ordinary copartnership suing jointly; so that notice to one of its members is not notice to all." The cases of *Duncan v. Chamberlayne (b)* and *Ex parte Thomas, in re Styan (c)*, may be relied on for the defendant. The doctrine of those cases, however, underwent consideration, and was virtually overruled, by the Vice-Chancellor, in *Thompson v. Speirs (d)*, where the question arose upon the effect of an assignment of a policy in the *Equitable Assurance Company*, without notice, with reference to the 72nd section of the 6 *G. 4. c. 16*. All the inconveniences pointed out in that case would result here from holding that a notice to *Dixon* operated as notice to the bank. The doctrine of

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(a) 12 *M. & W.* 655.(b) 11 *Simons*, 123.(c) 1 *Turn. & Ph.* 105.(d) 14 *Law J., N. S.*,  
Chancery, p. 453.



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 ——— apply, unless the bank be fixed with notice or knowledge  
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*Byles*, Serjt. (with whom was *Tomlinson*), for the defendant. It appears from the case, that, in *February*, 1840, when the account was opened by *Grantham, Page, & Co.* with the bank, there existed in *Liverpool* three firms trading under the respective names of *Grantham, Page, & Co.*, *John Grantham & Co.*, and *Page & Grantham*; the first consisting of *Page* (the defendant), and *Grantham, Mather, and Dixon*; the second, of *Grantham, Mather, and Dixon*; the third, of the defendant *Page* and *Grantham* only. In *January*, 1842, an arrangement was come to which clearly operated a dissolution of the firm of *Grantham, Page, & Co.*, *inter se*. The main question for the consideration of the court is, whether the bank had notice, actual or constructive, of that dissolution, so as to discharge the defendant in respect of advances subsequently made. There may be some difficulty in saying that there was *actual* notice; but it is submitted that the circumstance of *Dixon*, one of the members of the firm of *Grantham, Page, & Co.*, being also a partner in the bank, and one of its directors, at all events fixes them with *constructive* notice, upon the authority of *Dunn v. Chamberlayne*, which is not affected by the subsequent case of *Thompson v. Speirs*. The fact of the real plaintiffs here being a joint-stock bank, makes no difference in this respect; the operation of the statutes 1 & 2 *Vict. c. 96.*, and 5 & 6 *Vict. c. 85.*, being, not to make these co-partnerships bodies corporate, but merely to enable them to sue and be sued by and in the name of an individual, so as to obviate the necessity of having recourse

(a) 1 *Meriv.* 604.



to difficult and expensive proceedings in a court of equity. *Hill v. The Manchester and Salford Waterworks Company*, and *Dunston v. The Imperial Gas-Light and Coke Company*, were both cases of corporations acting under seal. In those cases, it could no more be said that the whole body was affected by notice to one of its members, than it could be that the Bank of *England* is bound by a notice to one who is a holder of bank stock. And the opinion expressed by *Parke, B.*, in *Steward v. Dunn* is a mere *obiter dictum*, applicable to a state of facts falling far short of those of the present case. If notice to an individual member of the copartnership will not suffice, it follows that a notice to nine hundred and ninety-nine, the whole company consisting of one thousand, would be equally ineffectual. But, if notice to a member is not enough, surely notice to a director must bind the copartnership. Notice to the manager would confessedly have sufficed; and, according to *Mayhew v. Eames (a)*, notice to a principal is notice to his agent. It was the duty of *Dixon*, who knew that *Page* had been released from responsibility for the engagements of the firm of which he had been a member, to communicate that fact to the other members of the board. Assuming, then, that the bank had either actual or constructive notice of the dissolution of the partnership of *Grantham, Page, & Co.*, on the 6th of *January, 1842*, it is quite clear, according to the doctrine of *Clayton's case (b)*, that *Page* is entitled to say that the balance then due to the bank has been liquidated by the subsequent payments made to them. In *Simson v. Ingham (c)*, *Bayley, J.*, says: "The general rule is, that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a

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(a) 3 B. & C. 601., 5 D. & R. 484., 1 C. & P. 550.

(b) 1 Meriv. 604.

(c) 2 B. & C. 65., 3 D. & R. 249.



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right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. But there is a third rule, viz., that, where one of several partners dies, and the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners, must be applied to the old debt." And that rule was adopted by this court in the subsequent case of *Smith v. Wigley (a)*. There, *W.* and *T.*, partners, were indebted to the plaintiff: after the dissolution of the partnership, *T.* also became indebted on his separate account to the plaintiff: and it was held, that, in the absence of any specific appropriation by either party, payments made by *T.* after the dissolution must go in reduction of the entire account, and consequently must discharge the earlier items.

*Channell*, Serjt., was heard in reply.

*Cur. adv. vult.*

**TINDAL**, C. J., now delivered the judgment of the court.

This was an action of assumpsit, brought to recover the balance of a banking account. The declaration contained counts for work and labour and commission, and the money counts. The defendant pleaded — first, non assumpsit — secondly, payment — thirdly, that the defendant was sued as one of a copartnership trading under the name of *Grantham, Page, & Co.*, consisting of the defendant, *John Grantham, John Philips Mather,*

(a) 3 *M. & Scott*, 174.



and *William Dixon*, and that the said copartnership had a set-off against the banking company — fourthly, that the defendant retired from the said copartnership, which was thenceforth carried on under the firm of *John Grantham & Co.*, and that there was an agreement between all the members of the firm of *Grantham, Page, & Co.*, and the banking company, that the banking company should accept the firm of *John Grantham & Co.*, as their debtors for the sum due from *Grantham, Page, & Co.*, and exonerate and discharge the defendant from all liability for such sum, and that such agreement was performed — fifthly, as to 3177*l.* 6*s.* 4*d.*, accord and satisfaction by the delivery of two bills of exchange amounting to that sum. The replication joined issue on the first plea, traversed the second and third, denied the agreement and the performance of it mentioned in the fourth plea, and also the agreement to accept, and the receipt of the bills mentioned in the last plea.

The case came on to be tried before me at the sittings in *London* after *Hilary* term, 1844, when it was agreed between the parties that no question should be submitted to the jury, but that the facts should be stated in a special case for the opinion of the court, and that the court should have power to draw any inference which a jury might have drawn, and should direct how the verdict should be entered on the several issues joined. The case was argued before us during the last term; and the court took time to consider the several points which were then discussed. The principal question in the case was,—whether the banking company had either actual or constructive notice of *Page's* withdrawal from the firm of *Grantham, Page, & Co.*, before the debt now sought to be recovered was contracted. We think it clear that the facts stated in the case do not warrant the inference that the banking company actually knew of the dissolution of partnership between *Page*

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and his copartners: and, indeed, it was hardly contended by my brother *Byles* that such an inference could fairly be drawn. But his main argument was, that, as *Dixon*, one of the firm of *Grantham, Page, & Co.*, was a shareholder in the *Liverpool* bank, what he knew must, in point of law, be considered as known to the banking company. It has been held that notice to the principal is notice to the agent, because it is the duty of the principal to give notice to his agent: *Mayhew v. Essex*. (a) In like manner, notice to the Bank of England in London, has been held to operate as notice to their branch banks; at all events, from the time when information of it could be transmitted to them: *Willis v. The Bank of England*. (b) But those cases are obviously distinguishable from the present: the banking company and its individual shareholders cannot be considered as bearing the relation to each other of principal and agents. The cases of *Porthouse v. Parker* (c) and *Jacard v. French* (d) bear a greater resemblance to the present; for, in those cases, it was held, that, where a firm consists of several persons, the knowledge of one is the knowledge of all. And, such being the established rule of law, the real question in this case is, whether *Dixon* is or is not to be considered as a member of an ordinary banking copartnership; for, if he is, the knowledge acquired by him in the firm of *Grantham, Page, & Co.*, would be binding upon him and his copartners in the banking concern, and they could not sue *Page* for a debt contracted by *Grantham, Page, & Co.*, after *Dixon* knew that he, *Page*, had withdrawn from that firm. But we are of opinion that a joint-stock banking company, established under the

(a) 3 B. & C. 601., 5 D. & H. 484., 1 C. & P. 550.

(b) 4 Ad. & E. 21., 5 N. & M. 478.

(c) 1 Campb. 82.

(d) 12 East, 317. And see *Gordon v. Ellis*, 7 M. & G. 607., 8 Scott, N. R. 290.



provisions of the 7 G. 4. c. 46. and 1 & 2 Vict. c. 96., and suing in the name of a public officer, is not to be considered as an ordinary copartnership, but a *quasi* corporate body, and that such joint-stock company is not affected by that which may be known to any individual shareholder. The public officer represents a fluctuating body, and sues for the existing body of shareholders, who may be different persons from those who were so at the time when the cause of action accrued. And this opinion is confirmed by what fell from Mr. Baron *Parke* in *Steward v. Dunn* (a), although it was unnecessary to decide the point in that case. It was pressed upon us, in the course of the argument, that, even assuming that to be the law in general, yet, as *Dixon* was a member of the board of directors, the company must be affected by that which was known to him: but, as the case states that he had not, as a director, any management of, or interference in, the banking accounts, we think that the circumstance of his being a director makes no difference in this respect.

The plaintiff, then, is entitled to a verdict upon the first issue, on non assumpsit; and, as it appears to us that the facts stated do not make out any of the defendant's special pleas, — as to which, indeed, no argument was offered before us, — the verdict must be entered generally for the plaintiff, for the balance sought to be recovered.

Postea to the plaintiff. (b)

(a) 12 M. & W. 664. "Since that act, a company of this kind is in the nature of a corporation, not an ordinary copartnership suing jointly; so that notice to one of its members is

not notice to all." S. C. 1 Dowl. & L. 642. 649.

(b) And see *Edwards v. The Grand Junction Railway Company*, 1 Mylne & Craig, 650. 659.

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POTT and Others, Assignees of WEATHERBY and Others, Bankrupts, v. EYTON and JONES.

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One who takes a share of the profits, as such, of a trading concern, thereby becomes a partner as to third persons, on the ground of those profits forming a portion of the fund upon which creditors have a right to rely for payment.

**A**SSUMPSIT for money paid &c. by the bankrupts before their bankruptcy. The defendant *Jones* suffered judgment by default; the defendant *Eyton* pleaded non assumpsit, and several special pleas, which it is unnecessary to notice.

At the trial before *Tindal*, C. J., at the sittings in *London* after last *Michaelmas* term, it appeared, that, in 1828, the defendant *Eyton* was concerned in a colliery at *Mostyn*, in *Flintshire*; and an agreement was entered into between him and *Jones* for opening a tally shop at *Mostyn Quay* (not far from the colliery), principally with

Yet the receipt of a percentage upon the gross amount of sales made to certain customers, by the person who recommended such customers, does not constitute him a partner as against third persons.

*A.*, who was concerned in a colliery, in the year 1830, built and stocked a general shop in its neighbourhood, for the purpose of supplying goods to the workpeople, placing *B.* there to conduct the business; *A.* receiving for his own use 7 per cent. upon the amount of the gross sales made to the miners; and *B.* taking all the rest of the profits of the concern, from whatever source derived. *A.*'s name appeared over the shop-door, and in the excise licences; and, down to the year 1834, all the goods supplied to the shop were purchased and paid for by or in the name of *A.* In that year it was agreed between *A.* and *B.*, that the latter should thenceforward buy all goods that were required for the shop, and that the former should receive only 5 per cent. upon the amount of sales to the miners. After this new arrangement had been come to, *B.*, who had several other shops, opened an account with a bank at *Holywell*, and, on the failure of the bank in 1839, there was a balance due to the bankers on that account exceeding 2000*l.* There was no evidence to shew that credit was in fact given to *A.* by the bank, or that they were aware that his name had been placed over the shop door, or that they supposed him to be a partner at the time the debt was contracted.

In an action by the assignees of the bankers against *A.* and *B.*, to recover the balance, the jury having negatived the existence of an actual partnership between *A.* and *B.*, or that *A.* had, with his own permission, been held out as a partner, the court refused to disturb the verdict.



a view of supplying goods to the workmen at the colliery. *Eyton* built the shop, and his name was placed over the door; licences to sell tea, &c., were taken out in his name; and the invoices for goods that were supplied to the shop, were made out in *Eyton's* name, who paid for the same. *Jones* managed the shop. The workmen at *Eyton's* colliery were supplied with goods from it, for which they settled at the colliery when their wages were paid, until the truck system was abolished in 1831. From that time *Eyton's* workmen made their payments at the shop, once a fortnight. *Jones* paid over to *Eyton* the principal part of the money taken at the shop, as he paid for the goods, but reserved sufficient for such small payments as were usually made at the shop. *Eyton* received for his own use 7*l. per cent.* on the amount of all sales to his workmen; and *Jones* had all the rest of the profits of the concern, from whatever source derived. In 1834, a change was made in the arrangements between *Eyton* and *Jones*. The latter was thenceforth to buy in his own name all goods supplied to the shop, and receive payment for all goods sold; and *Eyton* was to receive 5*l. per cent.*, instead of 7*l. per cent.*, on the amount of sales to his workmen. *Eyton* objected to his name remaining over the door; but *Jones* said, that, if he was not allowed to retain it, he could not pay the 5*l. per cent.*; and the name remained over the door till October, 1840, when a fire occurred, which put an end to the business. In 1834, when *Jones* began to buy goods, he opened an account with the bankrupts, who were bankers at *Holywell*. The bank failed in 1839, and at that time there was a balance exceeding 2000*l.* due to it on that account. Besides the shop at *Mostyn Quay*, *Jones*, after 1834, opened three others at other places, which he carried on in his own name, and on his own account; and he supplied them with goods from the shop at *Mostyn Quay*.

There was no evidence to shew that credit was in

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fact given to *Eyton* by the bankers, or that they knew that his name had appeared over the door of the shop at *Mostyn Quay*, or in the licences, or that they ever supposed him to be a partner. Two individuals were in court who had been in the employ of the bank during the currency of the account, the one as manager, the other as clerk; but they were not called as witnesses, the plaintiffs resting their case solely upon the evidence of *Jones*.

On the part of the plaintiffs, it was insisted that they were entitled to recover against *Eyton* the balance due to the bankrupts at the time of their bankruptcy, on the ground that he was either an actual partner with *Jones* in the shop at *Mostyn Quay*, by taking a share of the proceeds, or had been so held out as a partner, with his own permission, as to enable *Jones* to pledge his credit.

The learned judge left it to the jury to say — first, whether there had been a sharing of profit and loss between *Eyton* and *Jones* after the account was opened with the bank in 1834, so as to constitute an actual partnership between them; secondly, whether *Eyton* had been, by his own permission, held out as a partner, and his credit pledged to the bank.

The jury, answering both these questions in the negative, returned a verdict for the defendants.

Sir T. *Wilde*, Serjt., in *Hilary* term last, obtained a rule nisi for a new trial, on the ground that the verdict was against the evidence.

*Channell*, Serjt., in *Easter* term, shewed cause. The defendant *Eyton* had no such direct interest in the proceeds of the trade, as to make him liable as a partner with *Jones*. In *Ex parte Hamper*, Lord *Eldon* says (a):

(a) 17 *Ves.* 404. 412.



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“It is clearly settled, — though I regret it, — that, if a man stipulates that, as the reward of his labour, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given *quantum* of the profits, that will not make him a partner.” [Erle, J., Lord Eldon there draws a distinction between a payment of a fixed sum and a percentage: he goes on — “But, if he agrees for a part of the profits, *as such*, giving him a right to an account—though having no property in the capital—he is, as to third persons, a partner; and, in a question with third persons, no stipulation can protect him from loss.”] Eyton had no participation in the profits, *as such*. But, in consideration of his advancing money to set the concern going, and of his supposed influence over the workpeople at the mine, it was agreed that he should receive, at first 7*l. per cent.*, and afterwards 5*l. per cent.*, upon the gross sales to them. Before the opening of the account with the bankrupts, in 1834, an important change took place in the arrangements between Eyton and Jones. The goods were no longer purchased for the shop at *Mostyn Quay* by Eyton, but were purchased and paid for by Jones in his own name. [Erle, J. Was the banking account a separate account for the shop at *Mostyn Quay*? or was it a general account kept by Jones for the various shops opened by him?] That did not distinctly appear. [Erle, J. In order to charge Eyton in respect of a participation of profits, it should have been shewn, affirmatively, that credit was given to that concern in the profits of which he was to share.]

Sir T. Wilde, Serjt. (with whom was Archbold), in support of the rule. The effect of the agreement between Eyton and Jones was, to constitute a partnership between them, *quoad* third persons having dealings with the concern at *Mostyn Quay*. The facts



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proved bring the case precisely within *Waugh v. Carver*. (a) There, *A.* and *B.*, ship-agents at different ports, entered into an agreement to share, in certain proportions, the profits of their respective commissions, and the discount on the bills of tradesmen employed by them in repairing the ships consigned to them, &c.: and it was held, that, by this agreement, they became liable to all persons with whom either contracted as such agent, though the agreement provided that neither should be answerable for the acts or losses of the other, but each only for his own. *Eyre*, C. J., there says: "A case may be stated, in which it is the clear sense of the parties to the contract, that they shall not be partners; that *A.* is to contribute neither labour nor money, and, to go still further, not to receive any profits. But, if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner; not upon the ground of the real transaction between them, but upon the principles of general policy, to prevent the frauds to which creditors would be liable, if they were to suppose that they lend their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing." And, referring to *Grace v. Smith* (b), the learned judge says: "He who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." *Eyton's* participation in the profits, — according to the doctrine of Lord *Eldon* in *Ex parte Hamper*, — clearly rendered him liable as a partner. His lordship there says (c): "The

(a) 2 H. Bla. 235.

(b) 2 W. Bla. 998.

(c) 17 Ves. 404.



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question whether the joint commission can be supported, turns upon two or three circumstances; first, whether *Thomas* and *Rogers* were partners; not upon the present state of the agreement between them; as they may clearly agree that all the property which is the subject of that agreement shall be the property of one exclusively, but that the other shall participate in the profit arising from it. The cases have gone further to this nicety—upon a distinction so thin that I cannot state it as established upon due consideration,—that, if a trader agrees to pay another person for his labour in the concern a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner; but, if he has a specific interest in the profits themselves, as profits, he is a partner.” Here, the defendant *Eyton* had a specific interest in the profits. ‘The facts are simple. The shop at *Moslyn Quay* was built and stocked by *Eyton*, whose name was inserted in the excise licences, and appeared over the shop-door. The business was to be conducted by *Jones*, he paying to *Eyton* 7 per cent. originally, and afterwards 5 per cent., upon the sales to the work-people employed at a mine in which *Eyton* was interested. Down to the year 1834, the goods that were sold at the shop were either sent there from another shop belonging to *Eyton*, or were purchased and paid for by *Eyton*. Down to this period, at all events, there clearly was such a division of profits between *Eyton* and *Jones* as to constitute them partners; and their relative position was not altered by any thing that occurred subsequently. On the failure of the bank in 1839, *Eyton* furnished money for the purpose of opening an account with another bank; and, when the fire happened in *October*, 1840, *Eyton* took the whole of the property that remained on the premises unconsumed, and agreed to pay the debts. *Eyton*’s liability to be charged as a partner with the



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debt due to the bank, is wholly unaffected by Jones's appropriation of part of the goods to the other shops, in which *Eyton* had no interest. [*Erle, J.* referred to *Hantayne v. Bourne* (a), where it was held that the resident agent appointed by the directors of a mining company to manage the mine, has not an *implied* authority from the shareholders of the company, to borrow money upon their credit in order to pay the arrears of wages due to the labourers in the mine, who have obtained warrants of distress upon the materials belonging thereto, for the satisfaction of such arrears — nor in the case of any other necessity, however pressing.] That is altogether distinguishable from the case of partners, who have a general authority to open a banking account. [*Coltman, J.* The opening of a banking account does not necessarily imply that there was a loan of money by the bank.] It is by no means a departure from the usual course of dealing.

*Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court — recapitulating the facts (*ut supra*, pp. 32, 33.).

On this state of facts, it was contended for the plaintiffs, that they were entitled to recover the balance against *Eyton*, as having been in partnership with *Jones*. I left it to the jury to say whether there was a sharing of profit and loss between *Eyton* and *Jones* after the account was opened; and, if not, whether *Eyton* was, by his own permission, held out as a partner, and credit given to him by the bankrupts. The jury answered both questions in the negative, and returned a verdict for the defendant. In *Hilary* term, a rule nisi for a new trial, on the ground that the verdict was against the evidence, was granted; which rule in the course of the last term

(a) 7 M. & W. 595. And see *Ricketts v. Bennett*, post, T. T 1847, acc.



was fully argued. Our judgment was deferred, in order that we might carefully examine the evidence given at the trial; and, having done so, we cannot find any ground for disturbing the verdict.

There was no evidence to shew that credit was in fact given to *Eyton*, or that the bankers knew that his name was over the door of the shop at *Mostyn Quay*, or that they supposed him to be a partner. One person who had been manager, and another who had been a clerk, in the bank, were in court; and, if they could have given such evidence, they would no doubt have been called as witnesses. We must assume, therefore, that credit was given to *Jones* alone; and, if *Eyton* is to be made liable, that must be on the ground of an *actual* partnership between himself and *Jones*.

It was contended that an actual partnership was proved; for, that *Eyton*, by taking 5*l. per cent.* on the sales to his workmen, received a share of the profits, and was therefore, in point of law, a partner as to third persons. But we are of opinion that the taking of that money was not sufficient to make him a partner. Traders become partners between themselves by a mutual participation of profit and loss: but, as to third persons, they are partners if they share the profits of a concern; for, he who receives a share of the profits, receives a part of that fund upon which the creditors of the concern have a right to rely for payment, and is therefore to be made liable to losses, although he may have expressly stipulated for exemption from them: *Grace v. Smith* (a); *Waugh v. Carver*. (b) But, in the former of those cases, Lord Chief Justice *De Grey*, after laying down the rule of law in the terms which I have mentioned, proceeds: "If any one advances or lends money to a trader, it is lent on his general personal

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security. It is no specific lien upon the profits of the trade; and yet the lender is generally interested in those profits; he relies on them for repayment." Afterwards, he says: "I think the true criterion is, to inquire whether *Smith* agreed to share the profits of the trade with *Robinson*, or whether he only relied on those profits as a fund of payment — a distinction not more nice than usually occurs in questions of trade and usury. The jury have said that this is not payable out of the profits." So, in the present case, the jury have said there was no agreement to share the profits. This distinction has been recognized in many cases; of which it may suffice to mention *Dry v. Boswell* (a) and *Benjamin v. Porteus*. (b) And although in *Ex parte Hamper* (c), Lord *Eldon* said the distinction was so thin that he could not state it as established upon due consideration, yet he acted upon it in that case, and again in *Ex parte Watson* (d), where he said — "One who receives a salary, not charged upon profits—according to a known, though nice, distinction—is not by that a partner." Nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as agent, or commission on sales. And it appears to us, that, in the present case, the payment to *Eyton* was in the nature of commission on certain sales supposed to be effected through his influence over his workmen, and was not sufficient to render him, as a matter of legal inference, liable as a partner; and in so far as it was a question of fact, it was disposed of by the jury.

This view of the subject renders it unnecessary to consider whether *Eyton*, if a partner in the shop at

(a) 1 *Campb.* 329.(b) 2 *H. Bla.* 590.(c) 17 *Ves.* 404.(d) 19 *Ves.* 459.



*Mostyn Quarry*, would have been liable on the banking account.

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Upon the whole, we are of opinion that the verdict was right, and that the rule for a new trial must be discharged.

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Rule discharged.

RICHARD HENRY TOLSON v. The Bishop of  
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May 23.

**QUARE impedit.** The first count stated that Sir *Thomas Lamplugh*, Knight, now deceased, in his lifetime, to wit, on or about (a) the 19th of *March*, 1625, was, or his trustees were (a), seised of the advowson of the vicarage and parish church of *Bridekirke*, otherwise *Brydekirke*, in the county aforesaid, in gross by itself, as of fee and of right; and the said Sir *Thomas*, being so seised, afterwards, to wit, on the day and year aforesaid, in the time of peace, in the time of our late lord King *James* the First, presented to the said church, being then vacant by the death of the then last incumbent thereof, one *Joseph Williamson*, his clerk, who was afterwards, to wit, on the day and year aforesaid, admitted, instituted, and inducted into the same; and the said Sir *Thomas*, being so seised as aforesaid, afterwards, and before the 24th of *June*, 1677 (b), to wit, on the 7th of *June*, 1631, duly made and published his last will and testament in writing, bearing date, to wit, the day and year last aforesaid, and signed by the said Sir *Thomas* according to the form of the statute in such

The rules of *Hilary* term, 4 *W.* 4. do not apply to actions of *quare impedit*.

In *quare impedit*, the declaration contained six counts, all founded upon the same title, but taking it up from different periods: — 'The court refused to put the plaintiff to his election upon which of the counts he would rely.

(a) *Sic.*

(b) The day on which the statute of frauds came into operation.



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case made, and thereby gave and devised the said advowson to the use of his brother *George Lamplugh* and the heirs male of his body; and, in default of such issue, to the use of his brother *Anthony Lamplugh* and the heirs male of his body; and, in default of such issue, to the use of his brother *William Lamplugh* and the heirs male of his body; and, in default of such issue, to the use of his brother *Cuthbert Lamplugh* and the heirs male of his body; and, in default of such issue, to the use of his kinsman and servant, *George Lamplugh* and the heirs male of his body; and, in default of such issue, to the use of his kinsman and servant, *John Lamplugh*, and the heirs male of his body; and, in default of such issue, then to the right heirs of the said Sir *Thomas Lamplugh*, for ever; and the said Sir *Thomas* afterwards, to wit, on the 26th of *December*, 1632, died so seised of the said advowson as aforesaid, without altering his said will as to his said devise of the said advowson; whereupon and whereby the said *George Lamplugh*, the brother of the said Sir *Thomas*, became and was seised of the said advowson as of fee and right, by form of the gift aforesaid; that is to say, to him and the heirs male of his body: and the same *George*, being so seised thereof, afterwards, to wit, on or about the 22nd of *November*, 1633, died so seised thereof, without any issue male; whereupon the said *Anthony Lamplugh* became and was seised of the advowson, as of fee and right, by form of the gift aforesaid; that is to say, to him and the heirs male of his body: and the said *Anthony*, afterwards, to wit, on the 1st of *December*, 1650, died so seised as aforesaid of the said advowson, without any issue male; whereupon the said *William Lamplugh* became and was seised of the said advowson, as of fee and right, by form of the gift aforesaid, that is to say, to him and the heirs male of his body, under the said will of the said Sir *Thomas Lamplugh*: and the said *William*



afterwards, to wit, on the 1st of *January*, 1652, died without any issue male; whereupon the said *Cuthbert Lamplugh* became and was seised of the said advowson, as of fee and right, by form of the gift aforesaid, that is to say, to him and the heirs male of his body, by virtue of the said will of the said Sir *Thomas Lamplugh*: and the said *Cuthbert* afterwards, to wit, on the 1st of *January*, 1653, died so seised as aforesaid of the said advowson, without leaving issue male; whereupon the said *George Lamplugh*, the kinsman and servant of the said Sir *Thomas*, became and was seised of the said advowson, as of fee and right, by form of the gift aforesaid, that is to say, to him and the heirs male of his body: and the last-mentioned *George* afterwards, to wit, on the 1st of *May*, 1764, died without issue male; and the said *John Lamplugh*, the kinsman and servant of the said Sir *Thomas*, in his will mentioned, long before the death without issue male of the last-mentioned *George Lamplugh*, to wit, on the 1st of *January*, 1670, died without issue male; and, upon the death of the said Sir *Thomas Lamplugh*, and during the said several estates by him granted, the first-mentioned *George Lamplugh*, as brother and heir of the said Sir *Thomas Lamplugh*, became and was entitled, as of fee and right, to the reversion of and in the said advowson, expectant on the determination of the said several estates-tail, and afterwards, during the continuance of the said estates, to wit, on the 22nd of *November*, 1633, died so entitled; whereupon the said *Anthony Lamplugh*, as brother and heir of the said Sir *Thomas*, became and was entitled, as of fee and right, to the said reversion of and in the said advowson, expectant on the determination of the several estates-tail, and afterwards, and during the continuance of the said several estates-tail, to wit, on the 1st of *December*, 1650, died so entitled as aforesaid; whereupon the said *William Lamplugh*, as brother and heir of the said Sir

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wards, and during the continuance of the said estates-tail, to wit, on the 2nd of *September*, 1680, died so entitled as aforesaid; whereupon the said *Frances Bullock*, as heir of the said Sir *Thomas*, became and was entitled, as of fee and right, to the said reversion of and in the said advowson, expectant on the determination of the said estates-tail, and afterwards, and during the continuance of the said estates-tail, to wit, on the 2nd of *September*, 1680, died so entitled as aforesaid; whereupon *Abraham Molline*, as son and heir of the said *Frances Bullock*, and heir of the said Sir *Thomas*, became and was entitled, as of fee and right, to the said reversion of and in the said advowson, expectant on the determination of the said several estates-tail, and afterwards, and during the continuance of the said estates-tail, to wit, on the 2nd of *September*, 1680, died so entitled as aforesaid; whereupon *Richard Tolson*, as son and heir of *Henry Tolson*, who was son and heir of *Eleanor Tolson*, who was sister and heir (a) of the said Sir *Thomas*, and as heir of the said Sir *Thomas* became and was entitled, as of fee and right, to the said reversion of and in the said advowson, expectant on the determination of the said estates-tail, and afterwards, and during the continuance of the said estates-tail, to wit, on the 2nd of *July*, 1690, died so entitled as aforesaid; whereupon *Henry Tolson*, as son and heir of the last-mentioned *Richard*, and as heir of the said Sir *Thomas*, became and was entitled, as of fee and right, to the said reversion of and in the said advowson, expectant on the determination of the said estates-tail, and afterwards, and during the continuance of the said estates-tail, to wit, on the 27th of *September*, 1724, died

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(a) The words "and heir" appear to be incorrect. As *Anthony Lamplugh* survived his brother Sir *Thomas Lamplugh*, *Eleanor Tolson* could not have

been the immediate heir of Sir *Thomas*: she never was, even as remote heir, *in loco hæredis*, inasmuch as she must have died before *Abraham Molline*.



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so entitled as aforesaid; whereupon *Henry Tolson*, as son and heir of the last-mentioned *Henry Tolson*, and as heir of the said *Sir Thomas*, became and was entitled, as of fee and right, to the said reversion of and in the said advowson, expectant on the determination of the said estates-tail, and, during the continuance of the said estates-tail, to wit, on the 1st of *September*, 1729, died so entitled as aforesaid: whereupon *Henry Tolson*, as son and heir of the last-mentioned *Henry*, and as heir of the said *Sir Thomas*, became and was entitled, as of fee and right, to the said reversion of and in the said advowson, expectant on the determination of the said estates-tail, to wit, on the 2nd of *February*, 1763, died; whereupon *Richard Tolson*, as son and heir of *William Tolson*, who was brother and heir of the last-mentioned *Henry Tolson*, and son and heir of the said *Henry Tolson*, the second of that name who became entitled to the said reversion, and as heir of the said *Sir Thomas*, became and was entitled, as of fee and right, to the said reversion of and in the said advowson, expectant on the determination of the said estates-tail, and afterwards, upon the determination of the said estates-tail, became and was, as such heir of the said *Sir Thomas*, seised, as of fee and right, of and in the said advowson, and afterwards, to wit, on the 19th of *June*, 1815, died so seised as aforesaid; whereupon the said *Richard Henry Tolson*, as son and heir of the last-mentioned *Richard Tolson*, became and was seised, as of fee and right, of and in the said advowson; and being so seised as aforesaid, the said church of the said vicarage of *Bridekirke*, otherwise *Brydekirke*, afterwards, to wit, on the 30th of *September*, 1843, became vacant by the death of the last incumbent thereof; whereby it then and there belonged, and now belongs, to the said *Richard Henry Tolson* to present a fit person to the said church, so being vacant as aforesaid; yet the said bishop (and the other defendants) would not permit him, but un-



justly hindered him the said *Richard Henry Tolson* from presenting a fit person to the said church.

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The second count alleged a seisin in *Anthony Lamplugh*, a presentation by him of one *Nicholas Beeby*, his clerk, and the admission, institution, and induction of *Beeby* on the 22nd of *September*, 1634 — a conveyance of the advowson by *Anthony Lamplugh*, by deeds of lease and release of the 1st and 4th of *December*, 1635, to the use of himself for life, with successive remainders to the use of *Anthony Lamplugh* the younger, *Anthony Lamplugh* in that count first mentioned, *Cuthbert Lamplugh*, brother of *Anthony Lamplugh* the elder, *Francis*, the son of *John Lamplugh*, *Henry Tolson*, son of *Eleanor Tolson*, sister of *Anthony Lamplugh* the elder, and their respective heirs male, with remainder to the use of *Anthony Lamplugh* the elder, his heirs and assigns for ever — the deaths of *Anthony Lamplugh* the elder, *Anthony Lamplugh* the younger, *Cuthbert Lamplugh*, and *Francis Lamplugh* respectively without issue male, and the death of *Henry Tolson* on the 30th of *October*, 1663, whereupon *Richard Tolson*, as son and heir male of *Henry Tolson*, became seised of the advowson in fee, and died on the 2nd of *July*, 1690, so seised — that thereupon one other *Henry Tolson*, as son and heir male of *Richard Tolson*, and heir male of the body of the first-mentioned *Henry Tolson*, became seised, and died so seised on the 27th of *September*, 1724 — that, upon his death, one other *Henry Tolson*, as son and heir male of the said *Henry Tolson* in that count secondly mentioned, and heir male of the body of *Henry Tolson* in that count first mentioned, became seised, and died so seised on the 6th of *November*, 1734 — that thereupon one other *Henry Tolson* son and heir male of the said *Henry Tolson* in that count thirdly mentioned, and the heir male of the body of *Henry Tolson* in that count first mentioned, became seised, and died so seised on the 2nd of *February*, 1763 — that thereupon one other

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*Richard Tolson*, as son and heir male of *William Tolson* (which *William Tolson* was brother and heir male of the said *Henry Tolson* in that count fourthly mentioned, and son of *Henry Tolson* in that count thirdly mentioned), and as heir male of the body of *Henry Tolson* in that count first mentioned, became seised of the advowson, and died so seised on the 19th of *June*, 1815 — that thereupon the plaintiff, as son and heir male of the last-mentioned *Richard Tolson*, and heir male of the body of *Henry Tolson* in that count first mentioned, became seised; and, being so seised, the church became vacant, &c.

The third count stated the seisin of *Anthony Lamplugh* — the conveyance by lease and release as in the second count — that, by the release, a power was reserved to *Anthony Lamplugh* the younger to appoint the advowson, by deed or will, to the use of his wife for life, to take effect in possession immediately after the deaths of *Anthony Lamplugh* the elder and *Anthony Lamplugh* the younger — that *Anthony Lamplugh* the elder died seised on the 1st of *December*, 1650 — that *Anthony Lamplugh* the younger, by deed duly executed, appointed the advowson to the use of *Elizabeth* his wife for life: it then alleged the death of *Anthony Lamplugh* the younger without issue — “whereupon, and by virtue of the last-mentioned indenture and the last-mentioned deed of appointment, and by force of the statute made for transferring uses into possession, *the said Ellen*, then the widow of the said *Anthony Lamplugh the elder*, became and was seised of the advowson, as of freehold and right, for the term of her life, by form of the gift last aforesaid, and afterwards, to wit, on the 1st of *January*, 1660, took to her husband *Peter Wyard*; by virtue whereof, and by force of the statute aforesaid, the said *Peter Wyard* and *Elizabeth* his wife became and were seised of the said advowson, as of freehold and right, for the term of the



life of the said *Elizabeth*, by form of the gift and appointment last aforesaid; and, being so seised, the said *Peter Wyard* and *Elizabeth* his wife, afterwards, on the 6th of *March*, 1660, &c., presented to the said church, being then vacant by the death of the then last incumbent thereof, *Samuel Gresly*, their clerk," &c. The count then stated the death of the said *Elizabeth*, whereupon *Cuthbert Lamplugh* became seised; and it then brought the title down to the plaintiff, as in the second count.

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The fourth count stated, that one *Henry Tolson* the elder and *Henry Tolson* the younger, in their lifetime, to wit, on the 28th of *May*, 1701, were seised of the advowson, and, being so seised, presented *John Harrison*, their clerk, &c.: it then averred the deaths of *Henry Tolson* the elder and *Henry Tolson* the younger, on the 27th of *September*, 1724, and 10th of *September*, 1729, respectively — that thereupon one other *Henry Tolson*, as son and heir of the last-mentioned *Henry Tolson* the younger, became seised of the advowson, and died so seised on the 2nd of *February*, 1763 — that thereupon *Richard Tolson*, as son and heir of *William Tolson*, who was brother and heir of the last-mentioned *Henry Tolson*, became seised, and died so seised on the 19th of *June*, 1815 — that thereupon the plaintiff, as son and heir of the said *Richard Tolson*, became seised, and, he being so seised, the church became vacant, &c.

The fifth count alleged the seisin of one *Henry Tolson*, and the presentation and admission &c. of *Harrison*, on the 8th of *May*, 1701, the death of *Henry Tolson* on the 27th of *September*, 1724, of his son *Henry Tolson* on the 10th of *September*, 1729, of *Henry Tolson*, the son of the last-mentioned *Henry Tolson*, on the 2nd of *February*, 1763, and of *Richard*, the son of *William Tolson*, on the 19th of *June*, 1815, as in the fourth count.



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The sixth count alleged that one *Henry Tolson*, son and heir of one *Henry Tolson*, who was the son of one *Richard Tolson*, in his lifetime, to wit, on or about the 18th of *April*, 1720, was seised of the advowson, and, being so seised, presented *Harrison* — that the last-mentioned *Henry Tolson* died so seised on the 10th of *September*, 1729, whereupon one other *Henry Tolson*, as son and heir of *Henry Tolson* in that count first mentioned, became seised: it then proceeded to aver the death of the last-mentioned *Henry Tolson* on the 2nd of *February*, 1763, and the seisin of *Richard Tolson*, and his death on the 19th of *June*, 1815, as in the fourth count.

The declaration was delivered on the 8th of *July*, 1844. The defendants having repeatedly obtained orders for time to plead, upon the usual terms,

*Talfourd*, Serjt., in *Michaelmas* term, 1844, obtained a rule calling upon the plaintiff to shew cause why he should not elect which count he would retain, and why the other counts should not be struck out as superfluous.

*Manning*, Serjt., now shewed cause. The new rules of pleading do not apply to *quare impedit* or other real actions — *Barnes v. Jackson* (a); *Miller*, dem., *Miller*, ten. (b): and therefore, to entitle the defendants to make this rule absolute, they must be prepared to shew that the counts they seek to strike out are perfectly superfluous. In *Gully v. The Bishop of Exeter* (c), it was contended, upon the supposed authority of *Buckmere's case* (d), that properly there could be only one count in *quare impedit*. That case, however, is a dis-

(a) 1 *New Cases*, 545., 1  
*Scott*, 520., 3 *Dowl. P. C.* 404.

(b) 1 *Scott*, 387., 3 *Dowl.*  
*P. C.* 408.

(c) 4 *Bingh.* 525., 2 *M. &*  
*P.* 105.

(d) 8 *Co. Rep.* 87. b.



unct authority for the contrary proposition. It is stated to have been there resolved, that "such actions real which are founded upon a tort or deforcement, and do not comprehend any title in them, there the demandant may demand in one writ divers lands and tenements which come to him by several titles: as, if divers manors descend to me from several ancestors, and I am disseised or deforced of them, I may have a writ of right, or a writ of entry in the nature of an assise, or a writ of assise, and comprehend all these rights in one and the same writ, because in these cases no title is made in the writ. *Vide L. 5 Ed. 4, fo. 80. (a), 12 Ed. 4, fo. 1. a. (b), 17 Ed. 3, fo. 52. (c), 17 Ass. fo. 10. (d), 12 Ed. 3, Assise 112. (e), 22 Ass. fo. 52. (g), 66. (h), 7 Ass. fo. 18. (i), 7 Ed. 3, Assise 138. (k), 15 Ed. 3, Charge 9. (l), 15 Ass. fo. 11. (l).* But, if I bring a writ of entry on a disseisin done to my mother and aunt coparceners in fee-simple, the writ shall abate, for, here title is made in the writ; and it appears that there were several causes of action, because the title is by several ancestors; and therewith agrees the book in 31 *Hen. 6, fo. 14. b. (m), 43 Ed. 3,*

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(a) *Longo Quinto*, 80. The *Wychenden* case, of entry sur disseisin.

(b) *P. 12 E. 4, fo. 1, pl. 4.* in dower.

(c) *M. 17 E. 3, fo. 52, pl. 31.* in assise of novel disseisin of land.

(d) *Mandeville's* case, in assise of novel disseisin of rent-service. *Lib. Ass. anno 17, fo. 50, pl. 10.*

(e) *Preston's* case, in assise of novel disseisin of rent. *Fitzh. Abr. tit. Assise, pl. 112.*

(g) *Lib. Ass. anno 22, fo. 96, pl. 52,* in assise of novel disseisin of rent.

(h) *Lib. Ass. anno 22, fo. 100, pl. 66,* in assise of novel disseisin of rent-charge.

(i) *Lib. Ass. anno 7, fo. 12. pl. 18,* in assise of novel disseisin of land.

(k) *Fitz. Abr. tit. Assise, pl. 138.,* where the plaintiff brought one assise for several species of estovers, and where it was said by *Herle, J.*, that a man may have one assise for land and a corody.

(l) *Fitz. Abr. tit. Charge, pl. 9.,* and *Lib. Ass. anno 16, fo. 44, pl. 11,* in assise of novel disseisin of rent-charge and rent-service, of which the plaintiff was seised *per diversas manus.*

(m) *P. 31 H. 6, fo. 14, pl. 2,* Entry sur disseisin upon two different causes of action, held *bad*—formed on upon two gifts, held *good.*



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fo. 17. a.” (a) The action of *quare impedit* falls directly within the first branch of that resolution: for no title is made in the writ. (b) In *Fox v. The Bishop of Chester* (c), there were two counts — the first stating the advowson to be appurtenant to a manor — the second setting out a title to the advowson as in gross; and no objection was taken. So, in *Shepherd v. The Bishop of Chester* (d), the declaration contained four counts, all, substantially, founded upon the same title, varying only in the mode of stating it. Where, as here, a distinct title is set forth in each count, the court has no discretion; and, if it had, it would be slow to exercise such discretion by acceding to the present application, seeing that it might be doing the plaintiff great injustice to deprive him of any one of the titles on which he relies. Besides, the application is in breach of good faith, being made after repeated applications for time to plead, and time granted on the usual undertaking to plead issuably to *this* declaration.

*Talfourd*, Serjt., in support of the rule. After the decision come to by this court in the cases cited, it will probably be too late to contend that the new rules are applicable to an action of this nature; though, if the matter had been *res integra*, it might have been successfully contended that they were. [*Maule*, J. The new rules do not authorize an application *to the court*. *Tindal*, C. J. We can hardly be called upon to decide contrary to *Miller*, dem., *Miller*, ten.] The only question, then, is, whether the court, in the exercise of its discretion, will allow the whole of these six counts uselessly to encumber the record. That they all apply to identically the same title, is not denied: and it is quite

(a) *P. 43 E. 3*, fo. 17, pl. 20, in assise of novel disseisin of land.

(b) *F. N. B. 32*.

(c) 2 *B. & C. 635.*, 4 *D. & R. 93*.

(d) 6 *Bingh. 435.*, 4 *M. & P. 130*.



clear that the object of the plaintiff in stating it in this complicated form, is, merely to embarrass the defendants.

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TINDAL, C. J. I must confess I do not see my way with sufficient clearness to justify me in saying that any one of these counts ought to be expunged. It is impossible for us to foresee the extent of injury which we might inflict upon the plaintiff, if we were to adopt the course prayed by the defendants. I think the rule must be discharged.

The rest of the court concurred.

*Manning*, Serjt., prayed that the rule might be discharged with costs. The defendants have made an unfounded application, for that which, even if the court had been applied to in the first instance, there would have been no power to grant. Here, the rule was moved for after successive orders had been obtained for time to plead to these very counts. By taking this course, the defendants have not only created very considerable delay, but have put the plaintiff to heavy as well as unnecessary expense.

TINDAL, C. J. The question raised by this rule was one which was by no means free from doubt. We think the defendants ought not to be called upon to pay the costs of the application. (a)

Rule discharged, without costs.

(a) But see *Hinton v. Acraman*, post, M. T. 1846.



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ROBINSON v. JAMES BROWN and JANE BROWN,  
Executor and Executrix of JOHN BROWN,  
Deceased.

May 23.

The court will not interfere, under the statute 4 & 5 Ann. c. 16. s. 13., to stay the proceedings in an action upon a bond, where it is at all doubtful that the payment stipulated by the condition, is not subject to a contingency.

**D**EBT, upon a bond, dated the 1st of *April*, 1844, by *George Brown*, *John Brown*, and *John Robinson*, to the plaintiff, in the penal sum of 400*l*. The plaintiff having declared upon the bond without noticing the condition, the defendants, who were sued as executor and executrix of one of the sureties, set it out on oyer, and pleaded performance by the principal.

The condition with its recital was as follows:—

“Whereas the above-bounden *George Brown*, being about to carry on the business of an outfitter, hath applied to, and requested, the above-named *John Robinson* (the plaintiff) to supply him with goods in the way of his trade, which he the said *John Robinson* has agreed to do; and, in the course of the dealings between them, the said *George Brown* and *John Robinson*, the said *George Brown* may become indebted unto the said *John Robinson* in divers sums of money, for goods to be sold and delivered, for money to be lent and advanced, or to be paid, laid out, and expended, or upon some other account; and whereas the said *George Brown*, and the said *John Brown* and *Charles Robertson* as his sureties, have agreed to enter into the above-written bond or obligation, subject to such condition as hereinafter is expressed: Now, the condition of the above-written bond or obligation is such, that, if the said *George Brown*, his heirs, executors, or administrators, or some or one of them, do and shall, from time to time, and at all times hereafter, well and truly pay, or cause to be paid, unto



the said *John Robinson*, his executors, administrators, or assigns, all and every such sum and sums of money as shall, at any time or times hereafter, become due and owing to him the said *John Robinson*, either alone or jointly with any other person or persons who shall or may be or become a partner or partners with the said *John Robinson*, his executors, administrators, or assigns, from the said *George Brown*, for goods which shall or may at any time or times hereafter be sold by him or them to the said *George Brown*, and sent and delivered to or to the order of the said *George Brown*, or for money to be at any time or times hereafter lent or advanced, or to be paid, laid out, or expended by the said *John Robinson*, his executors, administrators, or assigns, either alone or jointly with any such partner or partners as aforesaid, or which may upon any other account whatsoever be or become due or owing to the said *John Robinson*, his executors, &c., either alone or jointly with any such partner or partners as aforesaid, when and as such sum and sums of money shall respectively become due and payable, not exceeding in the whole the sum of 400*l.*, then the said bond or obligation shall be void and of no effect; or, in case the said *George Brown*, his heirs, executors, or administrators, shall, at any time or times hereafter, make default in payment of any such sum or sums, and the said *John Brown* and *Charles Robertson*, or one of them, or the heirs &c. of one of them, shall, within one calendar month next after notice in writing shall have been given to them the said *John Brown* and *Charles Robertson*, their heirs, &c., or shall have been left at their usual or last known place of abode, well and truly pay or cause to be paid unto the said *John Robinson*, his executors, &c., and any future taken partner or partners of him or them, his, her, or their executors, &c., all and every such sum and sums of money as at the time of such demand being made shall

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be due and owing from the said *George Brown*, his heirs, &c., unto the said *John Robinson*, his executors, &c., either alone or jointly with the person or persons who shall or may be or become a partner or partners with him or them, in case the same shall not exceed the sum of 200*l.* sterling; but, if the same shall exceed the sum of 200*l.* sterling, then, if the said *John Brown* and *Charles Robertson*, or one of them, their or some or one of their heirs, &c., do and shall, within one calendar month next after such notice shall have been given or left as aforesaid, well and truly pay or cause to be paid unto the said *John Robinson*, his executors, &c., or such person or persons as aforesaid, the said sum of 200*l.*, in part satisfaction of the sum or sums of money which shall be then due and owing as aforesaid, then, and in either of the said cases, the said bond or obligation shall, so far as respects the said *John Brown* and *Charles Robertson*, be void and of no effect; otherwise the same shall be in full force and virtue."

The plaintiff, in his replication, assigned for breach the non-payment of the 400*l.*, alleging that the calendar month's notice required by the condition had been given to *John Brown* in his lifetime, instead of alleging, as the fact was, that notice had been given to the defendants after his death. The cause standing in the paper for trial, the plaintiff obtained leave to amend his replication, by averring the notice to have been given to "*Charles Robertson* and the defendants as executor and executrix of *John Brown*," upon payment of the costs of and occasioned by such amendment. The amendment was accordingly made and the costs paid.

*Channell*, Serjt., for the defendants, moved for a rule calling upon the plaintiff to shew cause why, upon payment of 200*l.*, with interest thereon from the 5th of *August*, 1845, and the costs of the action up to and includ-



ing the replication (a), all further proceedings in the action should not be stayed, and the defendants discharged from all further liability on the bond mentioned in the pleadings in this action. The application was founded upon the statute 4 & 5 Ann. c. 16. s. 13., which gives authority to the court to stay the proceedings on payment of "all the principal money due on the bond." (b) The learned serjeant submitted, that, according to the true construction of the bond, although the principal debtor was liable thereon to the extent of the penalty, the sureties were not liable at all without notice; and that, upon notice being given to them of the default of their principal, their liability extended only to 200*l*. [*Tindal*, C. J. The question is, whether the words of the statute mean, all that is due upon the bond, or all that is due thereon *from the defendant* in the action.]

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*Talfourd*, Serjt., *contra*, submitted that the lesser liability of the sureties was contingent upon the payment of the 200*l*. by them within one calendar month after notice; that they were liable to the full extent of the penalty, if the 200*l*. were not paid within the time limited; and that the court would not, by the exercise of a summary jurisdiction under the statute, prevent the plaintiff from raising that question upon the record.

(a) The 200*l*. and costs having been offered by the defendants when before the judge at chambers, upon the summons to amend the replication.

(b) The words of the clause are, that, "if at any time pending an action upon any such bond with a penalty, the defendant shall bring into court all the principal money and interest due on the bond, and also

such costs as have been expended in any suit or suits in law or equity upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond; and the court shall and may give judgment to discharge every such defendant of and from the same accordingly."



1846. TINDAL, C. J. The language of this condition gives  
 — rise to a very nice and subtle question, which I think  
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 v. plaintiff an opportunity of putting it upon the record.  
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The rest of the court concurring,

Rule refused. (a)

(a) At the trial before *Erle*, J., at the second sitting at *Westminster* in this term, the plaintiff obtained a verdict for 200*l.* and interest. That verdict, however, was afterwards set aside, and a new trial granted, on the ground that improper evidence of the service of notice on *Robinson*, had been received. *Vide post, Michaelmas Term, 1846.*

### PRYCE v. BELCHER.

May 25.

In case  
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CASE, against the defendant as returning officer for the borough of *Abingdon*, for not allowing the plaintiff to vote at an election for a member of parliament, although on the register of voters.

plaintiff's vote at an election of a borough member, the first count — after stating the writ and precept for the election — alleged that the plaintiff was a burgess, that his name was on the register of voters, that he tendered his vote for one of the candidates, and answered in the affirmative the questions authorized by the 6 & 7 *Vict. c. 18. s. 81.* to be put by the returning officer, and was ready and offered to take the oath prescribed by *s. 82.*; but that the defendant, being returning officer, *wrongfully, fraudulently, and wilfully intending to injure the plaintiff*, and to hinder and disappoint him of his privilege of and in the premises, refused to permit the plaintiff to give his vote, or allow the same to be entered and recorded, and a burgess was elected, the plaintiff being so excluded from giving his vote. To this count, the defendant pleaded that the plaintiff was not a burgess of the borough duly *qualified or entitled* to vote in or at the election therein mentioned: — Held, that the plea was bad for ambiguity.

The second count — after stating the writ and precept, and that the plaintiff was a burgess and on the register — proceeded to allege that he tendered his vote for one of the candidates; that it was the duty of the defendant, so being such returning officer, to allow such vote to be entered and recorded and cast up in



The first count of the declaration stated that the defendant, before and at the time of the committing of the grievances thereafter mentioned, and after the passing and coming into operation of the 6 & 7 *Vict. c. 18.*, intitled, &c., was mayor of the borough of *Abingdon*, in the county of *Berks*, which borough, before and at the time of the committing of the said grievances was, and now is, a borough that returned and returns one member to serve in parliament, and that to the defendant, as mayor of the said borough, by virtue of his said

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the poll-books ; that he was requested so to do ; but that he, contriving and *wrongfully and fraudulently and wilfully and maliciously intending to injure and damnify the plaintiff*, and to hinder and disappoint and deprive him of the benefit of his right and privilege aforesaid, instead of entering and recording the plaintiff's vote in the poll-books, to the end and intent aforesaid, refused so to receive the same, or to admit and allow the same to be so entered and recorded, to the end and intent aforesaid ; but, on the contrary thereof, caused the vote of the plaintiff to be entered in the column of *votes tendered* in the poll-books, and at the close of the poll refused to reckon, include, and cast up, and did not reckon, &c., the plaintiff's vote among the votes given for that candidate ; *whereby* the plaintiff was deprived of the benefit of his right to vote at that election : — *Semble*, that the count disclosed a *prima facie* cause of action.

The third count — after stating the writ and precept, that the plaintiff was a burgess and on the register, and that he tendered his vote — alleged that it was the duty of the defendant, as returning officer, to enter the vote on the poll-books without entering into or allowing a scrutiny ; but that the defendant, knowing the premises, but contriving and *wrongfully, fraudulently, wilfully, and maliciously intending to injure and damnify the plaintiff*, and to delay him in the exercise of his privilege of voting, and deprive him of the benefit of his said privilege, *wrongfully* ordered and allowed a scrutiny to be held with regard to the plaintiff's vote, and his right and qualification to vote, and *wrongfully* took upon himself to adjudge and determine, at and after such scrutiny so ordered and allowed, that the plaintiff was not entitled to give, and had no qualification enabling him to give, his vote at that election ; *whereby* the plaintiff was delayed, hindered, and obstructed in the exercise of his said privilege of voting, and a burgess was elected for that parliament, the plaintiff's vote being so hindered and obstructed, &c. : — Held, that this count also disclosed a *prima facie* cause of action — inasmuch as it was possible that the delay arising from the holding of a scrutiny (which is prohibited by the 6 & 7 *Vict. c. 18. s. 82.*) might have had the effect of preventing the plaintiff from exercising his right of voting, and, if so, that the action would be maintainable, the act of the defendant being wrongful, and having caused a particular damage to the plaintiff.

Held also, that the words subsequent to the *per quod* amounted to an averment of matter of fact, and were not mere matter of legal inference from the preceding allegations.



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office of mayor, of right belonged the execution of any writ or precept for the election of a member to serve in parliament for the said borough, which should be delivered to him, so being such mayor as aforesaid, and to be and officiate as returning officer at such election : that, on the 30th of *June, 9 Vict.*, a certain writ of our lady the now Queen issued out of the court of Chancery of the said lady the Queen, directed to the then sheriff of *Berkshire* aforesaid, reciting that Sir *Frederick Thesiger* had been then lately chosen burgess for the borough of *Abingdon*, in the said county, for the then present parliament of the said lady the Queen, summoned to be holden at the city of *Westminster*, of the said lady the Queen, on the 19th of *August, 5 Vict.*, on which day the said parliament was begun and holden, and from thence, by several adjournments and prorogations had been adjourned and prorogued, and there then holden ; and reciting that the said Sir *F. Thesiger*, having been so chosen a burgess for the said borough as aforesaid, had since then accepted the office of Attorney-General of the said lady the Queen, as by a letter of the trusty and well-beloved councillor of the said lady the Queen, *C. S. Lefevre*, speaker of the lower house of parliament of the said lady the Queen, more fully and plainly appeared ; by means whereof the subjects of the said lady the Queen, of the said borough, had been deprived of a burgess to treat for the benefit of the said borough in the said parliament of the said lady the Queen ; nevertheless, the said lady the Queen, being unwilling that the commonalty of Her kingdom in Her said parliament assembled to treat of business concerning the said lady the Queen, the state and defence of Her kingdom and the church, from the aforesaid cause, should be lessened or diminished, whereby those affairs might not have a due end, did command the said sheriff, that, in the place of the said Sir *F. Thesiger*



within the borough aforesaid, one other fit and discreet burgess of the aforesaid borough, proclamation of the said writ, and of the day and place, being first duly made, freely and indifferently, by those who should be present at the proclamation, according to the form of the statute in that case made and provided, he should cause to be elected ; and that the name of the said burgess he the said sheriff should cause to be inserted in certain indentures to be thereupon made between him the said sheriff and those who should be present at such election, whether at the said election he the said burgess should be present or absent, that he the said sheriff should cause him to come to the said parliament, in such manner that the same burgess so to be chosen might have full power and sufficient authority, for himself and the commonalty of the said borough, to do and consent to those things which in the said parliament of the said lady the Queen by the common council of her said realm (by the blessing of God) should happen to be ordained upon the aforesaid affairs ; willing, nevertheless, that neither the said sheriff nor any other sheriff of the kingdom of the said lady the Queen in any wise should be elected ; and that the election so made the said sheriff should distinctly and openly, under his seal and the seals of those who should be present at such election, certify to the said lady the Queen, in her Chancery, forthwith, remitting to Her the said lady the Queen one part of the said indenture annexed to the said writ, together with the said writ ; that the said writ, afterwards, and before the committing of the grievances thereafter mentioned, to wit, on the 1st of *July* in the year aforesaid, in the said county of *Berks*, was delivered to one *J. B. Monck*, Esq., the sheriff of the same county of *Berks*, to be executed in due form of law ; that by virtue of the said writ the aforesaid *J. B. Monck*, so being then and there sheriff of the county

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of *Berks* aforesaid, afterwards, and before the committing of the grievances hereinafter mentioned, to wit, on &c., made his certain precept in writing under the seal of him the said *J. B. Monck* of his office of sheriff of the county of *Berks* aforesaid, directed to the mayor of the borough of *Abingdon* aforesaid, reciting the aforesaid writ of our lady the Queen to him the said sheriff directed ; that, by his precept, and by virtue of the said writ, he the said sheriff did require him the said mayor,—because the execution of the said writ belonged to him the said mayor,—that he the said mayor should forthwith cause a burgess to be elected for the said borough in the place of the said *Sir F. Thesiger*, according to the command of the said writ, and that, when the said precept should be executed, he the said mayor should make known to him the said sheriff immediately after the said election made, so that he the said sheriff might certify the same, together with the said writ, and that precept return to our lady the Queen in Her Chancery forthwith ; that the said precept, afterwards, and before the committing of the grievances hereinafter mentioned, to wit, on &c., at the borough of *Abingdon* aforesaid, in the same county of *Berks*, was delivered to him the defendant,—then, and until and after the return of the same writ, being mayor of the said borough of *Abingdon* as aforesaid,—to be executed in due form of law ; that, by virtue of the said precept, and by virtue of the writ aforesaid, they the said burgesses of the borough of *Abingdon*, being in that behalf duly forewarned, to wit, on the 8th of *July*, in &c., at the borough of *Abingdon* aforesaid, before him the defendant, so being mayor and returning officer as aforesaid, were assembled to elect a burgess for the said borough, according to the exigency of the writ and precept aforesaid ; that, during that assembly, to that intention, and before such burgess by virtue of the writ and precept aforesaid was elected, to wit, on



&c. last aforesaid, at the borough of *Abingdon* aforesaid, he the plaintiff then being, *and the plaintiff averred that he then was, a burgess of the borough aforesaid*, and the name of the plaintiff being then inserted, and then standing and being, and the plaintiff averred that his name was then inserted and then stood and was, in the register of voters then in force for the said borough, to wit, the register of all persons entitled to vote in the election of a member to serve in parliament for the said borough, made and formed according to the provisions of the statutes in that case made and provided; and, the plaintiff's said name being and standing, and the plaintiff averred that his said name then stood and was, No. 216. in the said register of voters; and the plaintiff being then entitled, *and the plaintiff averred that he was then entitled, to give his vote* for the choosing of a burgess of the said borough according to the exigency of the writ and precept aforesaid, before him the defendant, mayor of that borough, to whom then and there it did duly belong, as such returning officer as aforesaid at the said election, to take and allow the vote of him the plaintiff of and in the premises, was ready and willing, and the plaintiff then offered to give, and then and there tendered his vote for choosing *James Caulfield, Esq.*, a burgess for that parliament, by virtue and according to the exigency of the writ and precept aforesaid; and he the plaintiff was then and there willing and ready to answer, and did then and there answer in the affirmative, to him the defendant, so being such returning officer as aforesaid, the questions authorised by the act of parliament aforesaid to be put by the returning officer at any election of a member or members to serve in parliament, if required on behalf of any candidate, to any voter, at the time of his tendering his vote at any such election, and which he the defendant, so being such returning officer as aforesaid, was then required on behalf of Sir *P. Thesiger*, a candidate at the said election, to put, and

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did then put to him the plaintiff, and he the plaintiff was then and there willing and ready to take, and then and there offered to take, the oath by the said act of parliament authorized to be administered by the returning officer at any election of a member or members to serve in parliament, if required on behalf of any candidate at the time aforesaid, to any voter, if he the defendant, so being such returning officer as aforesaid, should be required to administer, and should then offer to administer, the said oath; of all which he the defendant, so being such returning officer as aforesaid, then had notice; but he the defendant was not then required to administer, and did not then offer to administer the said oath; and the vote of him the plaintiff then and there of right ought to have been received and admitted and allowed to be entered and recorded; and the defendant, so being then and there returning officer as aforesaid, was then and there requested to receive and admit and allow to be entered and recorded, the vote of him the plaintiff, so tendered as aforesaid: nevertheless, he the defendant, so being then and there returning officer as aforesaid, well knowing the premises, but contriving and *wrongfully, fraudulently, and wilfully intending to injure and damnify him the plaintiff* in this behalf, and wholly to hinder and disappoint him of his privilege of and in the premises, did then and there hinder him the plaintiff from giving his vote in that behalf, and did then and there absolutely reject the vote of the plaintiff by him so tendered at the said election as aforesaid, and did then and there *absolutely refuse to permit him the plaintiff to give his vote* for choosing a burgess for the borough of Abingdon aforesaid, to the parliament aforesaid, and did not receive or admit, nor allow to be entered and recorded, the vote of him the plaintiff, for choosing James Caulfield, Esq., a burgess of that borough, to serve in that parliament, contrary to the said act of parliament, and to the statutes in that case made and provided;



and a burgess of that borough was elected for that parliament, he the plaintiff being so excluded from giving his vote, and his vote being so rejected by him the defendant, so being such returning officer as aforesaid, *and without any vote of him the plaintiff*, then and there by virtue of the writ and precept aforesaid; to the injury, enervation, and destruction of the aforesaid privilege of him the plaintiff in the premises, and the deprivation and loss of his said right to vote at the said election, and to have his vote received and admitted, and allowed to be entered and recorded, by the defendant, so being such returning officer as aforesaid.

The second count stated, that, before &c., and after the passing and coming into operation of the act of parliament in the first count mentioned, the defendant was mayor of the borough of *Abingdon*, which borough, before &c., was, and is now, a borough that returned and returns one member to serve in parliament; that, to the defendant, as mayor of the said borough, by virtue of his said office of mayor, of right belonged the execution of any writ or precept for the election of a member to serve in parliament for the said borough, which should be delivered to him, so being such mayor as aforesaid, and to be, and officiate as, returning officer at such election: that, on &c., a certain writ of our Lady the Queen issued out of the court of Chancery of our said Lady the Queen, directed to the then sheriff of *Berkshire*, and that such writ was and is in the same terms and to the same purport and effect as the writ in the said first count mentioned; that the said writ afterwards, and before the committing of the grievances, &c., to wit, on &c., in the said county of *Berks*, was delivered to one *J. B. Monck*, Esq., the sheriff of the same county of *Berks*, to be executed in due form of law; that, by virtue of the said writ, the said *J. B. Monck* afterwards, and before the said committing, &c., to wit, on &c., made

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his certain precept in writing under the seal of him the said *J. B. Monck* of his office of sheriff of the county of *Berks* aforesaid, directed to the mayor of *Abingdon* aforesaid; that the said precept was and is in the same terms, and to the same purport and effect, as the precept in the said first count mentioned; that, by virtue of the said precept, and by virtue of the writ aforesaid, the said burgesses of the said borough of *Abingdon*, being in that behalf duly forewarned, to wit, on &c., at &c. aforesaid, before him the defendant, so being mayor and returning officer as aforesaid, were assembled to elect a burgess for the said borough, according to the exigency of the writ and precept aforesaid; and, during that assembly, to that intention, and before such burgess, by virtue of the writ and precept aforesaid, was elected, to wit, on &c. last aforesaid, at &c. aforesaid, he the plaintiff then being, — and the plaintiff averred that he then was, — a burgess of the borough aforesaid, and the name of the plaintiff being then inserted, and then standing and being, — and the plaintiff averred that his name then was inserted and then stood and was, — in the register of voters then in force for the said borough, to wit, the register of all persons entitled to vote in the election of a member to serve in parliament for the said borough, made and formed according to the provisions of the statutes in that case made and provided, and the name of the plaintiff then standing and being, — and the plaintiff averred that his name then did stand and was, — No. 216. in the said register of voters then in force for the said borough as aforesaid; that the plaintiff, then being, — and the plaintiff averred that he then was, — entitled to give his vote for the choosing of a burgess of the said borough, according to the exigency of the writ and precept aforesaid, before him the defendant, so being mayor and returning officer as aforesaid, — to whom there and then it did duly belong to take



and allow the vote of him the plaintiff of and in the premises, — was ready, and he the plaintiff then and there offered, to give, and then and there tendered, his vote for choosing *James Caulfield*, Esq., a burgess for that parliament, by virtue of, and according to the exigency of, the writ and precept aforesaid, \* and the vote of him the plaintiff then and there of right ought to have been received and admitted, and allowed to be entered and recorded on the poll-books of the said election, by the defendant, so being then and there mayor and returning officer as aforesaid, to the end and intent, that, when he the defendant, so being such returning officer as aforesaid, should, after the final close of the poll at the said election, cast up the number of votes as they should appear on the said poll-books, and should openly declare the state of the poll, and make proclamation of the member chosen, according to the statutes in that case made and provided, the said vote of him the plaintiff should be reckoned, included, and cast up by him the defendant, so being such returning officer as aforesaid, among the number of votes so to be cast up as aforesaid, and in order to the making of the said declaration and proclamation as aforesaid, as having been given, admitted, and allowed for choosing the said *James Caulfield* a burgess for that parliament; that the defendant, so being there and then returning officer as aforesaid, was then and there requested to receive and admit, and allow to be entered and recorded on the poll-books of the said election, the vote of him the plaintiff, to the end and intent, that, when he the defendant, so being such returning officer as aforesaid, should, after the final close of the poll at the said election, cast up the number of votes as they should appear on the said poll-books, and should openly declare the state of the poll, and make proclamation of the member chosen as aforesaid, the vote of him the plaintiff should be

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reckoned, included, and cast up by him the defendant, so being such returning officer as aforesaid among the number of votes so to be cast up as aforesaid, and in order to the making of the said declaration and proclamation as aforesaid, as having been given, admitted, and allowed for choosing the said *James Caulfield, Esq.*, a burgess for that parliament: nevertheless, the defendant, being then and there mayor and returning officer as aforesaid, well knowing the premises, but contriving and *wrongfully, fraudulently, and wilfully, and maliciously intending to injure and damnify the plaintiff* in this behalf, and wholly to hinder and disappoint and deprive him of the benefit of his right and privilege aforesaid, of and in the premises, did then and there, instead of so receiving and admitting and allowing to be entered and recorded on the poll-books of the said election the vote of the plaintiff, to the end and intent aforesaid, *did then and there, when the plaintiff so tendered his vote* as aforesaid, and so requested him the defendant to receive the same, and to admit and allow the same to be entered and recorded as aforesaid, to the end and intent as aforesaid, *wholly refuse so to receive the same, or to admit and allow the same to be so entered and recorded*, to the end and intent as aforesaid; but, *on the contrary thereof, did then and there cause and procure the vote of the plaintiff to be entered within a certain space or column of the said poll-books, which space or column was and is headed with the words "For whom tendered,"* and the entry of any vote within which space or column indicates and signifies, — and the plaintiff averred that the entry of his vote within the said space or column did indicate and signify, — either that the name of the plaintiff had been omitted from the register of voters then in force for the said borough, in consequence of the decision of the barrister who had revised the lists from which such register had been formed, or



that the vote of some other person had already been received and allowed to be entered and recorded on the poll-books of the said election, as being registered in respect of the same qualification as that by virtue of which the plaintiff then claimed to vote, and that therefore the plaintiff was not entitled,—when he the defendant, so being such returning officer as aforesaid, should, after the final close of the poll at the said election, cast up the number of votes as they should appear on the said poll-books, and should openly declare the state of the poll, and make proclamation of the member chosen as aforesaid,—to have the said vote of him the plaintiff reckoned, included, and cast up by him the defendant, so being such returning officer as aforesaid, among the number of votes so to be cast up as aforesaid, and in order to the making of the said declaration and proclamation as aforesaid, as having been given, admitted, and allowed for choosing the said *James Caulfield* a burgess for that parliament: and the plaintiff further said, that, when he the defendant, so being such returning officer as aforesaid, did, after the final close of the poll at the said election, cast up the number of votes as they appeared on the said poll-books, and did openly declare the state of the poll, and make proclamation of the member chosen, according to the statutes in that case made and provided, *he the defendant did then wholly refuse, neglect, and omit to reckon, include, and cast up, and did not then reckon, include, and cast up, among the number of votes so cast up, and, in openly declaring the state of the poll, he the defendant did wholly refuse, neglect, and omit to reckon and include among the number of votes given for choosing the said James Caulfield, Esq., a burgess for that parliament, then declared by him, so being such returning officer as aforesaid, as and for the true state of the poll in that behalf, and the defendant did not then so reckon*

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*and include among the said number of votes, and in the state of the poll so then and there openly declared as aforesaid, the said vote of him the plaintiff; and a burgess of that borough was elected for that parliament, and proclamation was made of a member chosen, without any vote of him the plaintiff being so reckoned, included, and cast up as aforesaid; whereby the privilege of the plaintiff in that behalf was wholly injured, enervated, and destroyed, and he the plaintiff was wholly deprived of the benefit of his right to vote at the said election, and to have his said vote received and admitted and allowed to be entered and recorded on the said poll-books, and to have the same reckoned, included, and cast up by the defendant, so being such returning officer as aforesaid, among the number of votes so cast up after the close of the poll as aforesaid, and to have the same reckoned and included in the declaration by him the defendant, so being such returning officer as aforesaid, of the state of the poll, among the number of votes given, admitted, and allowed for choosing the said James Caulfield a burgess for that parliament.*

Third count.

The third count was similar to the second, down to the asterisk, p. 67; it then proceeded as follows — and it then and there became and was the duty of the defendant to enter the said vote of the plaintiff so tendered by him the plaintiff as aforesaid, upon the poll-books of the said election, without entering into or allowing any scrutiny by or before him the defendant, so being such returning officer as aforesaid, with regard to such vote: nevertheless, he, the defendant, being then and there mayor and returning officer as aforesaid, well knowing the premises, but contriving, and wrongfully, fraudulently, wilfully, and maliciously intending to injure and damnify him the plaintiff in that behalf, and further to vex, harass, and delay the plaintiff in the exercise of his privilege of voting, and to deprive him of the benefit



of his said privilege of and in the premises, *did there and then wrongfully order and allow a scrutiny to be held* before him the defendant, so being such returning officer as aforesaid, to wit, at the Guildhall in the said borough, *with regard to the vote of him the plaintiff*, so tendered by him the plaintiff as aforesaid, and with regard to the right and qualification of him the plaintiff to give his vote, and to have the said vote admitted and allowed; and did further wrongfully take upon himself to adjudge and determine, at and after such scrutiny so ordered and allowed and held as aforesaid, that the plaintiff was not then entitled to give, and had no qualification enabling him to give, his vote at the said election, and that he was not then entitled to have the same admitted and allowed, contrary to the provisions of the said act of parliament, and to the statutes in that case made and provided; whereby the plaintiff was not only then wrongfully vexed, harassed, delayed, hindered, and obstructed in the exercise of his said privilege of voting, but was then wholly deprived of the benefit of his said privilege, and a burgess of that borough was elected for that parliament, the vote of him the plaintiff being so hindered and obstructed, and without any vote of him the plaintiff then and there by virtue of the writ and precept aforesaid; and also by means of the premises, the plaintiff was otherwise greatly injured and damnified: to the damage of the plaintiff of 500*l.*, &c. (a)

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To the first count, the defendant pleaded, first, not guilty; secondly, that the plaintiff was not, at the time in that behalf in that count mentioned, a burgess of the said borough, duly *qualified or entitled* to vote in or at the election therein mentioned, in manner and form as therein alleged — concluding to the country.

Pleas to the  
first count.

(a) No step appears to have been taken on the ground that the insertion of these three counts was in apparent violation of the rules of *Hilary* term, 4 *W. 4.* rr. 5, 6.



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Special de-  
murrer to the  
second count.

To the second count the defendant demurred, assigning for causes — that no sufficient or any cause of action was thereby disclosed, and that it was not therein or therefrom apparent, that the plaintiff had sustained any damage by reason of any thing therein alleged or set forth — that it was consistent with every allegation in that count, that the plaintiff did in reality vote, and have his vote received and recorded, at the said election, or, at least, that there was nothing in that count which, with apt, convenient, or sufficient certainty or precision, excluded the possibility of the plaintiff's having so voted, and had his said vote duly admitted and recorded, thereat — that the count did not, with any sufficient certainty, shew that the tortious act therein charged was wilful or malicious, or that the defendant had any means of avoiding, or could have avoided the same, or that the plaintiff had sustained any legal damage therefrom — that the insertion of the plaintiff's name in the column complained of in that count might have been, for all that appeared to the contrary, a matter in itself altogether innocent and legal, and out of which no cause of action could or did originate, and might have arisen wholly from mistake or inadvertency either of the defendant or others, and that it was not stated therein, nor was it to be concluded therefrom, that such insertion was wilful or malicious — that, for aught that appeared to the contrary, the plaintiff's vote was allowed and received and recorded at the said election — that it did not sufficiently appear by averment that an election was held, or that the plaintiff had, or could have, in any way been prejudiced or damaged — and that the count was not sufficiently specific and certain, but was throughout too general, and it was only by inference, deduction, and conjecture, that any tort or cause of action could be traced or discovered therein, &c.

Special de-

Demurrer to the third count, assigning for causes



—that it disclosed no sufficient or any cause of action—that it nowhere therein appeared, either expressly or by implication, that the plaintiff did not vote at the election in that count mentioned—that, supposing the alleged scrutiny to have been held, it was not sufficiently shewn that the effect of such scrutiny was, or could have been, prejudicial to the plaintiff's vote—that the nature of the alleged scrutiny ought to have been shewn—that it was consistent with every allegation in that count that the alleged scrutiny consisted of nothing more than the inquiries directed to be made, and the questions put, under and by virtue of the act of parliament in that count mentioned—that, if the scrutiny complained of was really an illegal scrutiny, all the facts and circumstances attending and incidental to it should have been distinctly set forth with special and proper averments in that behalf—that it was not shewn in and by that count that the scrutiny complained of prevented the plaintiff from subsequently voting at the same election, or that the plaintiff did not in fact vote and have his vote duly received, admitted, and recorded at the said election—that no damage in law to the plaintiff was sufficiently or precisely shewn in or by that count, nor did it sufficiently or precisely appear that the defendant was guilty of any act of omission or commission maliciously or wilfully or knowingly, or that the plaintiff had sustained any injury or wrong by reason of the premises—and that the count was in other respects too vague, general, loose, uncertain, and insufficient.

The plaintiff, on his part, demurred to the second plea, assigning for causes—that the plea was ambiguous and uncertain, in this, that it was doubtful, and wholly impossible for the plaintiff to know in what sense the word “qualified” was used therein; whether as expressing that the plaintiff was possessed of a qualifica-

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tion, or certain property or interest the possession of which entitled him to be placed and retained on the register of voters ; or whether it was merely used tautologically, and as equivalent to the word “ entitled,” in the same plea used, and so traversed that the plaintiff was so entitled under the state of facts in the first count of the declaration averred — that, the meaning of the plea being thus doubtful, ambiguous, and wholly uncertain, no issue could safely be joined upon it by the plaintiff — that, by the allegation therein that the plaintiff was not “ qualified,” it was attempted to traverse and put in issue matters not alleged in the declaration, and wholly immaterial to the merits of the case, it being nowhere alleged in the first count, and it not being necessary to the plaintiff’s right of action to allege, that the plaintiff was “ qualified,” or possessed of a qualification ; but the allegations in the count amounting solely to this, that, having complied with all the requisites prescribed by the act of parliament in that count mentioned, the plaintiff was entitled to vote, as a matter of right, and that no judicial discretion, in any way whatever, lay with the defendant as returning officer at the said election — that the plaintiff could not, therefore, properly take issue upon the plea, inasmuch as the verdict of a jury upon it would in no way tend to the determination of the merits of the case — that, if the defendant desired to raise the question of the qualification of the plaintiff, he should have done it by a special plea in bar, concluding with a verification — that the plea was multifarious and uncertain, inasmuch as by the word “ qualified ” were attempted to be put in issue all the several facts in which the qualification of the plaintiff might consist, and it was left wholly in doubt which of the several facts the defendant intended to dispute, and the plaintiff was therefore left in ignorance what facts he would be called upon to prove at the trial of



the issue—that the plea should have stated, or taken issue upon, some single fact in which the qualification of the plaintiff might or ought to consist, and which was either alleged or necessarily implied in the count, and on which a single, certain, and material issue might have been joined—that the plea was multifarious and uncertain, in this, that it was attempted by the plea to put in issue all the facts in the count alleged, or necessarily implied, on which the title to vote at the said election of the plaintiff depended, and it was left wholly doubtful and uncertain which of the said several facts the defendant intended to dispute or deny, and the plaintiff was therefore left in ignorance what facts he would be called upon to prove at the trial of the issue, and no single, certain, and material issue could therefore be joined on the plea—that the plea should have traversed some single and material fact alleged in the count, on which the title to vote depended, and on which a single, certain, and material issue might have been joined—that the plea was double, in this, that it put in issue several facts, the determination of either of which would, it was pretended by the defendant, be a sufficient answer to the action, inasmuch as it attempted to put in issue both the qualification of the plaintiff, the want of which it was pretended by the defendant would be an answer to the action, and also attempted to put in issue the right and title of the plaintiff to vote under the circumstances in the count alleged—that the plea was also double, inasmuch as it attempted to put in issue all the several facts in which the qualification of the plaintiff consisted, the verdict of a jury as to any one of which, adversely to the plaintiff, would, according to the defence set up by the defendant, be a sufficient answer to the action, and on any one of which a single and certain issue might, therefore, have been tendered—that the plea was also double, inasmuch as it put in issue all the several facts in the count alleged; or

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necessarily implied, on which the right or title of the plaintiff to vote at the said election must depend, and the verdict of a jury as to any of which, adversely to the plaintiff, would necessarily be fatal to the plaintiff's right of action, and on any of which a single, certain, and material issue might, therefore, have been joined—that the plea was bad, because it attempted to put in issue and to submit to the consideration of a jury mere matters of law, namely, one or other of the questions whether or not the plaintiff was, in the state of facts alleged or implied in the declaration, “qualified,” or “qualified or entitled,” to vote, or “entitled to vote,” each of which questions, whichever it might be that was intended to be raised by the plea, was one proper for a court of law only to determine, and not proper to be submitted to the consideration of a jury; and, if the defendant desired to dispute either the plaintiff's qualification or his right and title to vote at the said election, he should either have traversed some single, certain, and material one of the facts in the said count alleged, or necessarily implied, or should have alleged some new matter which should destroy the plaintiff's right by a plea in confession and avoidance, or should have demurred to the count as insufficient on the state of facts there alleged, to show any such right or title to vote in the plaintiff; none of which courses had been adopted by the defendant;—that the plea concluded to the count, as improper, and with a verification—and that it was otherwise ambiguous, uncertain, informal, and insufficient, and should be demurred to.

The demurrer was argued in Easter term last.

At the trial of the above cause, the following facts were proved:—

1. That the defendant, Reich, is a freeholder of the county of Middlesex, and is entitled to vote at the said election.

2. That the plaintiff, Parce, is a freeholder of the county of Middlesex, and is entitled to vote at the said election.

And that, even in replevin, if there were cross demurrers, the plaintiff must begin.



be read as bringing into question the right of the plaintiff to be upon the register of voters, undoubtedly, it is not good, the seventy-ninth section of the 6 & 7 *Vict. c. 18.* making the register “conclusive evidence that the persons therein named continue to have the qualifications annexed to their names respectively” in the register in force at the election. (a) But, though the register is conclusive as to the qualification, there is another consideration that may be included in the party’s right to vote, namely, his continued residence in the borough; for, the same section contains a proviso, “that no person shall be entitled to vote at any future election for a member or members to serve in parliament for any city or borough, unless he shall, ever since the 31st of *July* in the year in which his name was inserted in the register of voters then in force, have resided, and *at the time of voting shall continue to reside*, within the city or borough, or place sharing in the election for the city or borough in the election for which he shall claim to be entitled to vote, or within the distance thereof required by the said recited act (b) to entitle such person to be registered in any year.” Omitting the word “qualified” (which may be regarded as surplusage), the plea is a simple traverse of the right of voting alleged in the first count. If the plaintiff was *entitled* to vote, he was *qualified* to vote: the terms are synonymous. [*Tindal*, C. J. The suggestion on the other side is, that you may be challenging the plaintiff’s qualification. *Cresswell*, J., the plea seems to invite a discussion which the statute expressly excludes.] At the most it is a mere expansion of that which the count necessarily implies: *Armani v. Castrique*. (c) [*Tindal*, C. J. The plea seems to point to two defences — the one, that the plaintiff was not on the register — the

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(a) And see *Wright*, App.,  
*Town Clerk of Stockport*, Resp.,  
 5 *M. & G.* 41, 42.

(b) 2 *W.* 4. c. 45. s. 27.

(c) 13 *M. & W.* 443.



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other, that he comes within the proviso in the 6 & 7 *Vict. c. 18. s. 79.*]

As to the second count, the question is whether it discloses any cause of action. In *Ashby v. White* (a), it was determined by the House of Lords, that a man who has a right to vote at an election for members of parliament, may maintain an action against the returning officer for *maliciously* refusing to admit his vote; though his right was never determined in parliament, and though the persons for whom he offered to vote were elected. But malice is an *essential* ingredient to support such an action, and must be *expressly* alleged: *Harman v. Tappenden* (b); *Drewe v. Coulton* (c); *Milward v. Sargeant* (d); *Cullen v. Morris*. (e) In the case last cited, *Abbott, C. J.*, in summing up, very learnedly and elaborately discusses the point: "If," says his lordship, "the plaintiff had a right to vote, the question is, whether the action be maintainable under the circumstances of the case. On the part of the plaintiff it has been contended, that he has a maintainable right of action without at all referring to the motives by which the defendant was influenced in rejecting his vote, and independently of the proof of any malicious intention on the part of the defendant. On the part of the defendant, it has been contended that an action is not maintainable for merely refusing the vote of a person who appears afterwards to have really had a right to vote, unless it also appears that the refusal resulted from a malicious and improper motive; and that, if the party act honestly and uprightly, according to the best of his judgment, he is not amenable in an action for damages. I am of opinion that the law, as it has been stated by

(a) 2 *Ld. Raym.* 938., 6 *Mod.* 46., 1 *Salk.* 19., 3 *Salk.* 17., *Lord Holt*, 524., 1 *Smith*, *Leading Cases*, 105.

(b) 1 *East*, 555.

(c) *Ib.* 563. n.

(d) *Ib.* 567. n.

(e) 2 *Stark. N. P. C.* 577.



the counsel for the defendant, is correct. The returning officer is, to a certain degree, a ministerial one; but he is not so to all intents and purposes; neither is he wholly a judicial officer; his duties are neither entirely ministerial nor wholly judicial: they are of a mixed nature. It cannot be contended that he is to exercise no judgment, no discretion whatsoever, in the admission or rejection of votes: the greatest confusion would prevail if such a discretion were not to be exercised. On the other hand, the officer could not discharge his duty without great peril and apprehension, if, in consequence of a mistake, he became liable to an action. It has been urged that Lord *Holt*,—who, with great honour to himself, once filled this seat,—intimated his opinion that the mere refusal of the vote of a person entitled to vote, would give the party a right to sue the returning officer. Whether he ever did say so or not, we do not certainly know; for, the reports of that case are very imperfect. No one entertains a greater veneration for that learned judge than I do; but, if he did so express himself, I am bound to deliver my opinion that he was mistaken. The case alluded to, *Ashby v. White*, had been tried by a jury; and, upon the face of the record, the defendant was charged with *malice*; and, when a writ of error was brought, the record itself was conclusive as to the malice of the defendant (a), since the court could look at nothing beyond the record. The next case which has been alluded to is that of *Grew v. Milward* (b); and there the declaration charged the defendant with having *wilfully and maliciously* refused the vote of the plaintiff; and there the jury found a verdict for the plaintiff with considerable damages, amounting to 300*l.*; from which it appears that the defendant had conducted himself very maliciously. A writ of error was then brought,

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(a) *Vide infra*, 80 (a).(b) 2 *Luders*, 245.



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but the averment of malice was upon the record (a), and ultimately the writ of error was abandoned. The next action was brought, not by the party whose vote had been refused, but by a candidate; and it was brought against the returning officer for having refused votes tendered on behalf of the plaintiff, and having returned another candidate. That action was founded upon the stat. of *Will. 3. (b)*; and that statute gives a right of action in those cases only where the act of the defendant is *wilful. (c)* A case afterwards came on to be tried before *Wilson, J.*, on the western circuit (*Drew v. Coulton*), which had been brought by the plaintiff against the defendant for having refused to admit his vote. It was admitted by the counsel for the plaintiff, that the plaintiff was one of a class of persons who had not, for a length of time, been allowed to vote; and it was held that the action was not maintainable; because the defendant had done no more than that which his predecessors had done. If a vote be refused with a view to prejudice either the party entitled to vote, or the candidate for whom he tenders his vote, the motive is an improper one, and an action is maintainable. The question for your consideration is, whether the refusal of the vote in this instance, was founded on an improper motive on the part of the defendant: it is for you to pronounce your opinion, whether the defendant's conduct proceeded from an improper motive, or from an honest intention to discharge his duty, acting under professional advice. If he intended to do prejudice either to the plaintiff or to the candidate for whom he meant to vote, the plaintiff is entitled to your verdict: if, on the other hand, he acted in the best way he could according to his judgment, your verdict ought to be for the defendant." The jury not being able to agree, no

(a) And appeared by that record to have been found by the jury to be *true*.

(b) 7 & 8 *W. 3. c. 25.*  
 (c) Sect. 6.



verdict was pronounced. The second count here does use words, in the first instance, which, if they overrode the whole allegation, might amount to a sufficient statement of malice: but, in alleging what the defendant, as returning officer, did, it does not charge that the act was done *wilfully and maliciously*: it merely alleges that the defendant refused to receive the plaintiff's vote, but caused it to be entered in the column of *votes tendered*, and that he omitted to reckon it among the number of votes at the close of the poll. It may have been omitted accidentally, or, for any thing that appears to the contrary, the defendant may have made an error in the casting up of the votes.

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The third count charges the defendant with having, as returning officer, wrongfully ordered a scrutiny with regard to the plaintiff's vote. There is no allegation that the vote was rejected, or that the plaintiff persisted in requiring his vote to be recorded. The proviso in sect. 79., before referred to, deprives the party of his right to vote, though on the register, if he has not continued to reside in the borough, or within seven miles thereof. Section 81. enacts, that no inquiry shall be permitted at the time of polling, as to the right of any person to vote, except — whether the voter is the same person whose name is on the register, and whether he has already voted at that election: and sect. 82. enacts, that “no scrutiny shall hereafter be allowed, by or before any returning officer with regard to any vote given or tendered at any such election.” The scrutiny here spoken of, is not an inquiry at the poll, but after its closing: that alleged in the third count may be the merely asking the questions prescribed by sect. 81. [Cresswell, J. The returning officer is prohibited by sect. 81., from putting to the voter any other questions than those referred to; and by sect. 82. it is enacted, that it shall not be lawful to reject any vote tendered by

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any person whose name is on the register, except by reason of its appearing to the returning officer, upon putting such questions as aforesaid, or either of them, that the person claiming to vote is not the person described on the register, or has previously voted: the officer is not to reject the vote by reason of the voter's having ceased to reside in, or within the prescribed distance of, the borough; and yet, by sect. 79., the party in such case is not entitled to vote!] It certainly is impossible to reconcile these various provisions. It is clear, however, that the third count discloses no cause of action whatever.

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*Kinglake*, Serjt., *contrà*. The special plea to the first count is clearly bad. It introduces new matter, and tenders an issue of fact upon matter not found in the declaration, and the consideration of which may involve matters wholly irrelevant and unimportant to the decision of the cause. [*Tindal*, C. J. It is ambiguous, at least; and that is pointed out as ground of demurrer.] It may raise the question of qualification—whether the plaintiff had become disqualified between the making of the register and the time of the election, or whether he had lost the franchise. [*Erle*, J. What is the difference between being *qualified*, and being *entitled*, to vote?] Under the 2 W. 4. c. 45. s. 58., if any change occurred in the qualification between the time of registration and the time of voting, the voter's qualification and right to vote would be gone. Now, however, by sect. 79. of the 6 & 7 Vict. c. 18., the register is conclusive evidence of the right to vote.

TINDAL, C. J. It appears to me that this traverse is bad for one of the reasons assigned as cause of special demurrer, viz. ambiguity. The declaration contains two separate and distinct allegations—the one, that the



plaintiff was a burgess of the borough of *Abingdon*, his name being and standing No. 216. in the register of voters for that borough — the other, that he was entitled to vote for the choosing of a burgess. The plea, instead of taking issue upon one of those averments, states that the plaintiff was not “a burgess of the said borough duly qualified or entitled to vote in or at the election” in the count mentioned; thus combining the two allegations in one traverse, and leaving it in doubt whether the defendant means to rely on the absence of the plaintiff’s name from the register, or upon his want of qualification as a voter. This the defendant clearly had no right to do. I therefore think there must be judgment for the plaintiff as to that plea.

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*Talfourd*, Serjt., prayed and obtained leave to amend, on the usual terms.

*Kinglake*, Serjt. The second count sufficiently discloses a cause of action, in the defendant’s refusal to receive and to record the plaintiff’s vote. The sixty-eighth section of the 2 *W. 4. c. 45.*, which regulates the mode of conducting the election, requires the poll-clerks, at the close of the poll, to deliver the poll-books, inclosed and sealed, to the returning officer, who is to cast up the number of votes, and openly declare the state of the poll, and make proclamation of the member or members chosen. The instant a returning officer refuses to receive the vote of a person who is on the register, the offence is complete. The plaintiff complains that his name was inserted by the defendant in the column appropriated, under sect. 59., to votes tendered by persons whose names are not on the register. Here, the plaintiff’s name was on the register; and the returning officer had no authority to reject his vote, provided he was ready to answer the two questions mentioned in sect. 81.

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The count, therefore, upon the face of it, discloses a specific grievance, arising from the wilful and wrongful act of the defendant. It alleges that the plaintiff's vote was entered in the poll-book only as a *vote tendered*; and, further, that a burgess was elected and returned without the vote of the plaintiff being reckoned and cast up among the number of votes. There is a distinct refusal throughout to receive and give effect to the plaintiff's vote. It may well be doubted, whether any averment of malice is necessary at all. Lord *Holt*, at least, in *Ashby v. White*, inclined to think it was not. And, though subsequent cases have decided that malice must be averred and proved, they all have proceeded upon the ground that the returning officer was *quasi* a judicial officer. Under the statutes now in force, however, the duties of the returning officer, — which are clearly pointed out and defined by the 6 & 7 *Vict. c. 18. ss. 81, 82. 86.*, — are purely of a ministerial character. He has no discretion. The power of adjudicating upon the right to vote of any person whose name appears on the register, is studiously reserved for parliament itself. (a) If malice be necessary, the second count does contain a sufficient averment of malice: *The King v. Phillips* (b); *The King v. Woodfall*. (c)

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The third count states, that the plaintiff, being entitled to vote, tendered his vote for the candidate named, that it was the duty of the defendant, as returning officer, to enter the plaintiff's vote on the poll-books without scrutiny, but that he, wilfully and maliciously, intending to injure the plaintiff, and delay him in the exercise of his privilege of voting, wrongfully allowed a scrutiny to be held with regard to the plaintiff's vote and qualification, and wrongfully adjudged, upon such

(a) See 6 & 7 *Vict. c. 18.*  
*s. 98.*

(b) 6 *East*, 464.

(c) 5 *Burr.* 2667.



scrutiny, that the plaintiff was not entitled to vote and had no qualification; whereby the plaintiff was hindered and deprived of his privilege, and a burgess was returned without the vote of the plaintiff. [*Erle, J.* It does not follow from what is alleged in the third count, that the defendant did not record the plaintiff's vote at the time it was tendered.] The count in substance alleges that the plaintiff's vote was disallowed. The holding a scrutiny, — which is expressly prohibited by the 82nd section of the 6 & 7 *Vict. c. 18.*, — gives a right of action, notwithstanding the vote should be afterwards recorded. And the 97th section enacts, "that every sheriff, undersheriff, clerk of the peace, town-clerk, secondary, returning officer, clerk of the crown, post-master, overseer, or other person, or public officer, required by this act to do any matter or thing, shall, for every wilful misfeasance, or wilful act of commission or omission, contrary to this act, forfeit to any party aggrieved, the penal sum of 100*l.*, or such less sum as the jury, before whom may be tried any action to be brought for the recovery of the before-mentioned sum, shall consider just to be paid to such party, to be recovered by such party, with full costs of suit, by action for debt in any of Her Majesty's superior courts at *Westminster*: provided always, that nothing herein contained shall be construed to supersede any remedy or action against any returning officer, according to any law now in force." An action will lie for the doing of anything that is prohibited by an act of parliament. [*Cresswell, J.* To whom?] To the party grieved. [*Cresswell, J.* That opens the whole argument. Was this plaintiff a party grieved?] The obstruction and refusal of his vote was a grievance, a legal damage. [*Tindal, C. J.* To entitle a party to maintain an action of this sort, must he not shew that he has sustained some actual

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sensible damage? In *Comyns's Digest* (a), it is said, that, "in all cases, where a man has a temporal loss or damage by the wrong of another, he may have an action upon the case, to be repaired in damages." "But (b) an action upon the case does not lie, where there is not any temporal damage." It is not necessary to shew, that the plaintiff has sustained any actual damage: it is enough, that the defendant has unlawfully obstructed him in the exercise of a legal right. In *Schinotti v. Bumsted* (c), it was held, that an action might be maintained against the commissioners of a lottery for not adjudging a prize to the holder of a ticket entitled to receive it. So, in *Taylor v. Henniker* (d), it was held, that, where a landlord distrains for more than is due for rent, an action on the case lies at the suit of the tenant, though the goods distrained are of less value than the rent really due; and it is no defence, that, after the distress and notice thereof, and before the sale, the landlord served a second notice on the tenant, stating the amount really due, and that the distress was taken for that amount only, and would be sold unless that amount was paid. Lord *Denman* there said: "There was a wrongful act of the defendant; and though, by reason of the value of the goods taken falling short of the actual rent due, no real damage was sustained, yet there was a legal damage and cause of action, for which the plaintiff was entitled to a verdict." [*Cresswell*, J. In that case, the crops distrained were kept for some months.] In *Weller v. Baker* (e) — the *Tonbridge Dippers'* case, where it was held that an action on the case would lie against the defendant for usurping the office of a dipper, not having been duly

(a) Tit. "Action upon the Case," (A.)  
 (b) *Ib.* (B. 1.)

(c) 6 T. R. 646.  
 (d) 12 Ad. & E. 488.  
 (e) 2 Wils. 414.



chosen at the homage — the court say that “an action upon the case will lie for a possibility of a damage and injury.” *Marzetti v. Williams*(a) and *Blofeld v. Payne* (b), also shew that there may be a legal damage to sustain an action, without any actual damage. [*Erle, J.* All these are cases of violation of private rights. In the case of non-repair of a highway, the being delayed in carrying goods to market has been held not to be such a specific injury as to give a right of action to an individual.] This count charges a violation of the peculiar and private privilege of the plaintiff. In *Ashby v. White*, Lord *Holt* says: “Every injury imports a damage, though it does not cost the party one farthing; and it is impossible to prove the contrary; for, a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As, in an action for slanderous words, though a man does not lose a penny by reason of the speaking of them, yet he shall have an action. So, if a man gives another a cuff on the ear, though it cost him nothing, no, not so much as a little diachylon, yet he shall have his action, for it is a personal injury. So, a man shall have an action against another for riding over his ground, though it do him no damage; for, it is an invasion of his property, and the other has no right to come there. And in these cases an action is brought *vi et armis*. But, for invasion of another’s franchise, trespass *vi et armis* does not lie, but an action of trespass on the case; as, where a man has *retorna brevium*, he shall have an action against any one who enters and invades his franchise, though he lose nothing by it. So, here, in the principal case, the plaintiff is obstructed of his right, and shall therefore have his action. And it is no objection to say that it will occasion multiplicity of actions; for, if

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(a) 1 B. &amp; Ad. 415.

(b) 4 B. &amp; Ad. 410.



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men will multiply injuries, actions must be multiplied too; for, every man that is injured ought to have his recompense."

*Talfourd*, Serjt., in reply, prayed leave to withdraw the demurrer to the second count, and to plead thereto. And, as to the third count — without impugning the general principle that an action will lie against a public officer, in respect of a private injury resulting to an individual from a violation of a public duty, though no palpable or substantial damage be shewn — he submitted, that here there was no specific allegation of damage or injury to the plaintiff that could form the subject of an action; for, that it was perfectly consistent with all that was alleged in the count, that the defendant received and recorded the plaintiff's vote, and held a scrutiny or investigation at a subsequent period.

*Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

The questions arising upon the plea to the first count, and upon the second count of this declaration, were disposed of upon the argument, by the defendant's being allowed to amend the plea, and to withdraw his demurrer, and plead over to the second count; the only remaining question, therefore, is, whether the third count, which is specially demurred to, is open to objection.

The third count sets out a writ to the sheriff of *Berkshire*, and a precept from the sheriff to the defendant, being mayor of *Abingdon*, to cause a burgess to be elected for the borough of *Abingdon*; by virtue of which the burgesses of *Abingdon* were assembled to elect a burgess for the borough of *Abingdon*, and that, during



that assembly, and before such burgess was elected, the plaintiff, being a burgess of the borough, and the name of the plaintiff being in the register of voters, and standing No. 216. in the list of voters, and the plaintiff being entitled to give his vote for the choosing of a burgess before the defendant, being the mayor and returning officer, to whom it belonged to take and allow such vote, the plaintiff was ready and offered to give his vote for choosing *James Caulfield*, Esq., a burgess for that parliament; and it was the duty of the defendant to enter the vote of the plaintiff on the poll-books, without entering into or allowing any scrutiny before him with regard to such vote: nevertheless, the defendant, wilfully and maliciously intending to injure the plaintiff, and to vex, and harass, and delay the plaintiff in the exercise of his privilege of voting, and to deprive him of the benefit of his said privilege, did wrongfully order and allow a scrutiny to be held before him the said defendant, so being such returning officer, with regard to the vote of the plaintiff so tendered by him as aforesaid, and with regard to the right and qualification of him the plaintiff to give his said vote, and to have the said vote admitted and allowed; and did further wrongfully take upon him to adjudge and determine, after such scrutiny, that the plaintiff was not then entitled to give, and had no qualification enabling him to give, his vote at the said election; whereby the plaintiff was not only wrongfully vexed, harassed, delayed, hindered, and obstructed in the exercise of his said privilege of voting, but was then wholly deprived of the benefit of his said privilege, and a burgess of that borough was elected for that parliament, the vote of him the plaintiff being so hindered and obstructed, and without any vote of him the said plaintiff.

On the part of the defendant, it was contended, that the words following the word "whereby" could not be

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considered as being an averment of matter of fact, but merely matter of conclusion or inference drawn from the matters previously alleged, and that the preceding matter did not disclose with due certainty any cause of action, it not being alleged that the scrutiny was held during the election, nor that the vote of the plaintiff was not entered on the poll-books, and reckoned up with the others.

On the part of the plaintiff, it was contended, that the holding of a scrutiny by the returning officer being expressly prohibited by the act, 6 & 7 *Vict. c. 18. s. 82.*, the action would lie for holding the scrutiny, though no damage resulted to the plaintiff; for which *Blofeld v. Payne (a)*, *Taylor v. Henniker (b)*, and *The Tonbridge Dippers' case (c)* were cited: and it was also contended, that, if damage was necessary to be alleged, there was a sufficient allegation of damage to the plaintiff.

No cases were cited to shew whether the matter alleged after the word "whereby" is to be considered as amounting, on demurrer, to a sufficient averment of matter of fact or not; nor have we found any decision on the point; though, in the case of *Colson & Perry (d)*, the point was incidentally discussed. In that case, the plaintiff declared, that Queen *Elizabeth*, being seised of the manor of S., granted him thirty acres, parcel of the manor, by copy, and granted four acres, parcel of the said manor, to the defendant, and alleged that the copyholders of the said thirty acres have at all times used to have common (e) for certain cattle, from the 1st of *August* till All Saints' day, in the four acres; and shews that the defendant, on the 1st of *May*, inclosed the said four acres with hedges and ditches, whereby he could not

(a) 4 *B. & Ad.* 410.(b) 12 *Ad. & E.* 488.(c) *Weller v. Baker*, 2 *Wils.* 422.(d) 2 *Roll. Rep.* 379.(e) As to this form of pleading, see *Pearce v. Bacon*, *Cro. El.* 390.; *Grymes v. Peacock*, 1 *Bulstr.* 17.



have his common &c. The defendant pleaded not guilty; and the verdict was found for the plaintiff. It was moved to arrest the judgment for not alleging the continuance of the inclosure after the 1st of *August*. All the judges agreed, that, after verdict, the judgment should not be arrested: but *Dodridge*, J., said that the *per quod* estuant le inclosurer del' (a) plea does not amount to an averment; the *per quod* is "un illation" and inference out of the preceding declaration, and will not amount to an averment, for, it is conclusion, and not the matter of the action; but he agreed, that, after verdict, the declaration is good. But *Ley*, C. J., said that the *per quod* amounted to an averment.

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It is to be observed, that the matter subsequent to the *per quod* was held in that case to be a sufficient averment, after verdict, not only of what was directly stated, but of a matter not stated, but only to be collected by inference, namely, that the inclosure of the four acres continued after the 1st of *August*. The allegation in question might, perhaps, be open to a special demurrer on that ground; but it does not follow from thence that the words following the *per quod*, in a declaration of this nature, are, in all cases, to be considered as matter of conclusion and inference only: on the contrary, the course of pleading shews that they are sometimes to be looked upon as allegations of matters of fact. In *Rastell* (b), is a precedent of an action by a master for the beating of his servant, with no allegation of the loss of service, except under the *per quod*. That the loss of service is a material fact requiring to be proved, is clear. It is said in *Mary's* case (c), "If my servant be beat, the master shall not have an action for this battery, unless the battery is so great that by reason

(a) The words "field, the" appear to be necessary to complete the sentence.

(b) *Rastell's Entries*, fo. 613. pl. 10.

(c) 9 *Co. Rep.* 113.



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thereof he loses the service of his servant; but the servant himself, for every small battery, shall have an action; and the reason of the difference is, that the master has not any damage by the personal beating of the servant, but by reason of a *per quod*, viz. *per quod servitium &c. amisit*, so that the original act is not the cause of his action; but the consequent upon it, viz. the loss of his service is the cause of his action; for, be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action." So, in the same case, it was said: "For every feeding by the cattle of a stranger, the commoner shall not have an assise, nor an action on the case, as his case is, but the feeding ought to be such *per quod* the commoner, &c., common of pasture &c. for his cattle &c. *habere non potuit, sed proficuum suum inde, per totum id tempus, amisit &c.*: so that, if the trespass be so small that he has not any loss, but sufficient in ample manner remains for him, the commoner shall not take them damage feasant, nor have any action for it." And a little lower it is said: "In the case at bar, the lord of the soil shall have an action for trespass done in the waste or common, as an immediate trespass to him, but the commoner shall not have an action but by consequence, viz. if the trespass be such *per quod proficuum communie suæ &c. amisit*, or that he could not have his common in so beneficial a manner as he had before."

It has, indeed, been since considered that the mere invasion of the commoner's right may furnish a ground of action against a stranger; but still the doctrine so laid down in *Mary's* case, is applicable to the present question; for, as the court in that case held the action maintainable, on the ground that it contained the allegation *per quod proficuum communie suæ &c. amisit*, it follows that they considered the matter alleged after the *per quod* to be a sufficient averment of a material fact: see *Hearne*, 125. So, in case of a nuisance to a highway,



whereby the plaintiff has received a particular damage, the precedents shew that the damage, which is the cause of action, may be alleged under the *per quod* (a), or (what does not seem materially to differ) under the words *ratione cuius*, &c. (b)

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Another ground of objection urged for the defendant, was, that the count was defective, in not shewing how the damage stated after the *per quod* resulted from the holding of a scrutiny, which, for any thing that appeared, might have been held after the election was finished and the return made; and, if the matter which follows the *per quod* were to be looked upon as being matter of inference and conclusion only, it might well be urged that it was an inference not legitimately drawn from the premises; but, if it is to be considered, as we think is, as an averment of a matter of fact, it will be sufficient if the damage in question might by possibility have resulted from the unlawful act of holding the scrutiny; and it is clearly possible that the delay arising from the holding of a scrutiny might have had the effect of preventing the plaintiff from exercising his right of voting; and, if such were the fact, there is no doubt the action would be maintainable, the act of the defendant being wrongful, and having caused a particular damage to the plaintiff.

As the defendant has obtained leave to amend his pleading in relation to the other counts, he ought to have leave (if he desires it) to withdraw his demurrer to this count, and to plead to it.

Judgment accordingly. (c)

(a) 1 *Chitty's Precedents*, 1st edit. pp. 241, 242.

(b) *Winch. Entr.* 47. And see *Lucas v. Nockells*, 10 *Bingh.* 157., 3 *Mo. & Sc.* 650., 1 *Clark & Fin.* 438., 7 *Bligh. N. S.* 140.; *Ransford v. Copland*, 6 *A. & E.* 482., 1 *N. & P.* 671.; 13

*Carnaby v. Wilby*, 8 *A. & E.* 872., 1 *P. & D.* 98.; *Cowan v. Braidwood*, 1 *M. & G.* 882., 2 *Scott, N. R.* 138. See also 5 *M. & R.* 468. n.

(c) See *Pryce v. Belcher*, *post*, Vol. IV. *Trinity T.*, 47.



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## WALBANK v. QUARTERMAN.

May 25.

The attorney who engages the service of the bailiff, and not the client, is the party liable to the bailiff for the fees usually allowed on taxation for the execution of process.

**D**EBT, for work and labour by the plaintiff and his servants for the defendant, at his request. Plea, never indebted.

At the trial, before *Erle, J.*, at the sittings in *London* after the last term, it appeared that the plaintiff, who was an officer of the sheriffs of *London* only, sought to recover from the defendant, an attorney, the amount of certain fees alleged to be due to him for executing warrants on process directed to the sheriffs of *London* and *Middlesex*, the warrants having been, at the defendant's instance, directed respectively to the plaintiff and to one *Hamber*, who was an officer of the sheriff of *Middlesex*, and with whom it was suggested, but not proved, that the plaintiff was in partnership. It being objected that, so far as related to the writs directed to the sheriff of *Middlesex*, *Hamber* should have sued, or at all events, should have joined in the action, the plaintiff's claim was ultimately limited to three guineas, for the execution of three warrants from the sheriffs of *London*; and for this sum a verdict was taken for the plaintiff, subject to leave reserved to the defendant to move to enter a nonsuit, or a verdict for him, on the ground that he was not *personally* responsible for these fees.

*Byles, Serjt.*, now moved accordingly. He submitted that the attorney was not liable, but that the action should have been brought against the client, by analogy to the cases of fees to messengers in bankruptcy, in respect of which the petitioning-creditor is liable, and not



the attorney — *Hartop v. Juckes* (a); *Hart v. White* (b); and expenses of witnesses — *Robins v. Bridge* (c): in which latter case, Lord Abinger, delivering the judgment of the court, says: “It is sufficient for the decision in this case to say that there is no implied contract by the attorney to pay the witness. The attorney is known merely as the agent — the attorney of the principal, and is directed by the principal himself. The agent, acting for and on the part of the principal, does not bind himself, unless he offers to do so by express words; he does not make himself liable for any thing, unless it is for those charges which he is himself bound to pay, and for which he makes a charge. If, therefore, he employs a stationer to do any thing for which he makes a charge, he is liable, as he is for the fees of the officers of the court; for, these are ready money transactions, for which the person engaged in the business of the court is liable; for, it cannot be presumed that the client would authorize him to pledge his credit in cases where no credit is given. It is known the marshal does not receive his fees from the party; but, on the contrary, from the attorney, who is daily practising there, and who is bound to pay, and not his client. But, in the case of a witness, it is different; he has no course of dealing with the attorney; he knows it is for the *party* that he is to give his evidence; his obligation is to the *party*, and, if he fails to attend, it is to the party’s loss.” [Maule, J. The case of a bailiff is much more like that of the officer of the court, than that of a witness. The inconvenience would be prodigious if it were held that the officer must look to the client for his fees: and there is no inconvenience in the other course.]

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(a) 2 M. & S. 488., 2  
Rose, B. C. 263. But see *Ex*  
*parte Hartop*, 12 Ves. 349.

(b) *Holt*, N. P. C. 376.  
(c) 3 M. & W. 114.



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TINDAL, C. J. If authorities were necessary in such a case as this, enough are to be found in the books. In *Townshend v. Carpenter* (a), it was expressly ruled that a sheriff's officer employed by an attorney to make arrests on *mesne* process issued at the suit of his clients, may sue the attorney for the fees usually allowed for such arrests on the taxation of costs [by the master, though such fees exceed the sum allowed to the sheriff and bailiff by the 23 H. 6. c. 10. And this ruling was confirmed by the court of King's Bench in *Foster v. Blakelock* (b), where Abbott, C. J., said: "I perfectly agree with what has been stated to shew that the sheriff cannot maintain an action for fees beyond those which are given by statute. Here, the bailiff could claim no fee beyond the 4*d.* allowed by the 23 H. 6. against the party arrested, but the prohibition extends to him only. The question is therefore open, whether, if an officer be specially employed to make an arrest, it may not be presumed that the party so employing him, gives him to understand that he will pay such sum as the court, upon the taxation of costs, is in the habit of allowing. I think that such an understanding may very fairly be presumed. Then, of whom is the officer to receive this sum? Undoubtedly he may claim it from the attorney by whom he is employed, and is not bound to look to the party in the cause, of whom he knows nothing."

MAULE, J. It can scarcely need authorities to prove that the *attorney* is the party liable to the officer. The case of a witness is altogether different.

The rest of the court concurred.

Rule refused. (c)

(a) R. & M. 314., 2 C. & P. 118.

(b) 5 B. & C. 328., 8 D. & R. 48.

(c) See *Newton v. Chambers*, 1 D. & L. 869. But see *Mayberry v. Mansfield*, 16 L. Journ., N. S., Q. B. 102.



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## BEARD v. EGERTON and Others.

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**C**ASE, for the infringement of a patent. The declaration stated, that, before and at the time of the making of the letters-patent, and of the committing of the grievances by the defendants, as thereafter mentioned, *Miles Berry was the true and first inventor* of the working or making of a certain manner of new manufacture *within this realm*, to wit, a certain invention of a

A patent granted to a British subject, in his own name, for an invention communicated to him by a foreigner, the subject of a state in

amity with this country, is not void, although such patent be in truth taken out, and held by the grantee, in trust for such foreigner.

In such case, the grantee is the true and first inventor within this realm, within the statute 21 Jac. 1. c. 3.

In case for an alleged infringement of a patent so granted, the defendant pleaded, that, by an agreement made in *France*, between the original inventor and the King of the French, the former, for the considerations therein mentioned, assigned the invention to the French government, and that, by virtue of that agreement, and by the laws of *France*, the invention became vested in the King of the French in right of his crown, who thereby became entitled, by the laws of *France*, to vend and publish the invention, as well in that country as in *Great Britain and Ireland*, and in any other country or place where he should think fit, without any licence from the inventor — concluding, “wherefore the said letters-patent were and are void,” &c. : — Held, that the plea was bad in substance, inasmuch as it contained no denial of the allegation that the patentee was the true and first inventor within this realm, which is all that is necessary to sustain the validity of the letters-patent, in respect of the granting thereof.

Held, also, that the circumstance of the original inventor having, for a valuable consideration, parted with his interest in the discovery to a person in *France*, was no bar to his right to take out a patent for the same invention in this country.

A further plea contained an additional allegation that the King of the French had openly published and made known the invention, and the manner of performing the same, to the people of *France*, for the use and benefit of that people, and of all other nations and people in the world, as a free gift and benefaction for the benefit of all mankind, without limitation or restriction ; whereby, according to the laws of *France*, the defendants became and were entitled to use, exercise and vend the said invention in any country or place, at their free will and pleasure, without the leave or licence or hindrance of the original inventor, &c. : — Held, that this plea afforded no answer to the action.

The title described the patent to be for “a new *or* improved method of obtaining the spontaneous reproduction of all the images received in the focus of the camera obscura : ” — Held, that this was sufficiently precise and certain.



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new or improved method of obtaining the spontaneous reproduction of all the images received in the focus of the camera obscura, and that such invention others at the time of the making of the said letters-patent did not use; that thereupon Her Majesty Queen *Victoria*, on the 14th of *August*, in the third year of her reign (1839), by Her letters-patent, bearing date at *Westminster* the day and year last aforesaid, under the Great Seal &c., for Herself, Her heirs and successors, did give and grant unto *Berry*, his executors, administrators, and assigns, her especial licence, &c., that *Berry*, his executors, &c., and every of them, by himself and themselves, or by his and their deputy or deputies, servants, or agents, or such others as *Berry*, his executors, &c., should at any time agree with, and no others, from time to time, and at all times thereafter during the term of years therein expressed, should and lawfully might make, use, exercise, and vend the said invention within that part of Her United Kingdom of *Great Britain* and *Ireland* called *England*, Her dominion of *Wales*, and town of *Berwick-upon-Tweed*, and also in all Her colonies and plantations abroad, in such manner as to *Berry*, his executors, &c., or any of them, should, in his or their discretion, seem meet; and that he, *Berry*, his executors, &c., should and lawfully might have and enjoy the whole profit, benefit, commodity, and advantage from time to time coming, growing, accruing, and arising by reason of the said invention, for and during the term of years therein and in that declaration after mentioned, — to have, hold, exercise, and enjoy the said licence, &c., thereinbefore granted, unto *Berry* his executors, &c., for and during and unto the full end and term of fourteen years from the date of the said letters-patent, &c., according to the statute in such case made and provided: and, to the end that he, *Berry*, his executors, &c., and every of them, might have and enjoy



the full benefit and the sole use and exercise of the said invention, according to Her gracious intention therein-before declared, Her said Majesty did by the said letters-patent, for Herself, Her heirs and successors, require and strictly command all and every person and persons, bodies politic and corporate, and all other Her subjects whatsoever, of what estate, quality, degree, name, or condition soever they might be within the said part of Her United Kingdom, &c., that neither they nor any of them, at any time during the continuance of the said term of fourteen years thereby granted, either directly or indirectly, should make, use, or put in practice the said invention, or any part of the same, so attained unto by *Berry* as aforesaid, or in any wise counterfeit, imitate, or resemble the same, or should make or cause to be made any addition thereunto or subtraction from the same, whereby to pretend himself or themselves the inventor or inventors, deviser or devisors thereof, without the licence, consent, or agreement of *Berry*, his executors, &c., in writing under his or their hands and seals, first had and obtained in that behalf, upon such pains and penalties as could or might be justly inflicted on such offenders for their contempt of that Her royal command; and further to be answerable to *Berry*, his executors, &c., according to law, for his and their damages thereby occasioned: that the said letters-patent were, amongst others, upon this express condition, that, if *Berry* should not particularly describe and ascertain the nature of the said invention, and in what manner the same was to be performed, by an instrument in writing under his hand and seal, and cause the same to be enrolled in Her said Majesty's high court of Chancery, within six calendar months next and immediately after the date of the said letters-patent, then the said letters-patent, and all liberties and advantages whatsoever thereby granted, should utterly cease, determine,

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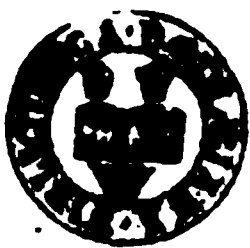
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and become void, any thing thereinbefore contained to the contrary thereof in anywise notwithstanding; as by the record of the said letters-patent, remaining inrolled of record in Her said Majesty's high court of Chancery, reference being thereunto had, would more fully and at large appear. Averment — that *Berry* did afterwards, and within six calendar months next and immediately after the date of the said letters-patent, by an instrument in writing, to wit, a specification, under his hand and seal, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed; and did afterwards, and within six months next and immediately after the date of the said letters-patent, to wit, on the 14th of *February*, in the said third year of the reign of Her said Majesty (1840), cause the said instrument in writing to be inrolled in Her said Majesty's high court of Chancery; as by the record of the said specification, remaining inrolled of record, reference being thereunto had, fully appeared. The declaration then alleged an assignment by *Berry* of all his interest in the patent to the plaintiff, by indenture of the 23rd of *June*, 1841; that the plaintiff thereby then became and was, and thence had been, entitled to the said privileges, authorities, benefit, profits, and advantages of the said letters-patent. Breach — that the defendants, well knowing the premises, but contriving, &c., after the making of the said letters-patent, and after the inrolment of the said specification and the making of the said indenture as aforesaid, and within the said term of fourteen years in the said letters-patent mentioned, to wit, on the 24th of *June*, 1841, and on divers other days and times between that day and the commencement of the suit, and within that part of the United Kingdom of *Great Britain* and *Ireland* called *England*, wrongfully, unlawfully, and unjustly, without the leave or licence, and against the will of the plaintiff, *did make, use, exercise, and vend the said invention*, to the benefit, use, and enjoyment whereof



the plaintiff had been and was so entitled as aforesaid, in breach of the said letters-patent, and of the privileges to which the plaintiff had been and was entitled as aforesaid; and that the defendants, well knowing the premises, but further contriving, &c., on &c., without the leave, &c., of the plaintiff, *did put in practice the said invention, &c.*; and that the defendants, well knowing the premises, but further contriving, &c., on &c.; without the leave &c. of the plaintiff, *did make, use, and put in practice a part of the said invention, &c.*; and that the defendants well knowing the premises, but further contriving, &c., on &c., *did imitate the said invention, &c.*; and that the defendants, well knowing the premises, but further contriving, &c., on &c., *did make certain additions to, and subtractions from, the said invention, to the benefit, use, and enjoyment whereof* the plaintiff had been and was so entitled as aforesaid, and did thereby pretend themselves to be the inventors and devisors thereof, in breach of the said letters-patent, and of the privileges to which the plaintiff had been and was so entitled as aforesaid: that, by means of the committing of the said several grievances by the defendants as aforesaid, the plaintiff had been and was greatly injured, and had lost and been deprived of divers great gains and profits which he might and otherwise would have derived from the said invention and letters-patent, and in respect whereof he had been and was entitled to such privileges as aforesaid, and had been and was otherwise damnified, &c.

Fifth plea — that, long before the making of the letters-patent in the declaration mentioned, to wit, on the 1st of *January*, 1839, one *Daguerre* had invented the said new or improved method of obtaining the spontaneous reproduction of all the images received in the focus of the camera obscura, in the declaration mentioned, and the said *Daguerre* and one *Niepce*, before the making of the said letters-patent, and at the time of

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their employing the said *Miles Berry*, and communicating the said invention to him as thereafter mentioned, and from thence until and at the time of making the said letters-patent, had knowledge of the said invention, and of the nature thereof, and in what manner the same was to be performed, and used, exercised, and practised the same in a certain foreign country, to wit, the kingdom of *France*; that *Daguerre* and *Niepce* were and are aliens, born in foreign parts, out of the allegiance of our lady the Queen, and within the allegiance of a foreign state, to wit, the said kingdom of *France*, and were, at and during all the times aforesaid, resident and domiciled in the last-mentioned kingdom; that they, being so resident and domiciled as aforesaid, and such aliens as aforesaid, and so using and practising the said invention as aforesaid, before the making of the said letters-patent, to wit, on the 1st of *June*, 1839, retained and employed *Berry* as their agent to procure such letters-patent as in the declaration mentioned, to be granted by our lady the Queen to him, *Berry*, in his own name, but upon trust for the use and benefit of *Daguerre* and *Niepce*, and not of *Berry*; that *Berry* then accepted of such retainer and employment, and, in order to enable him to obtain the letters-patent for the purpose aforesaid, *Daguerre* and *Niepce*, before the making of the letters-patent, to wit, on &c. last aforesaid, communicated to *Berry* the nature and particulars of the said invention, and in what manner the same was to be performed, and he then and thereby, and by no other means, first became and was possessed of the knowledge thereof; that thereupon, to wit, on &c. last aforesaid, *Berry* brought and introduced the knowledge of the said invention, and of the manner of performing the same, into the said United Kingdom, and was the first person who had received or brought in or into the said United Kingdom the knowledge of the said invention, and of the manner of performing the same; that



*Berry* was no otherwise the true and first inventor of the said invention, than by having such communication made to him as aforesaid, and by so becoming possessed of the knowledge of the said invention as aforesaid, and by his being the first person in the said United Kingdom who acquired or brought in or into the same the knowledge of the said invention, and of the manner of performing the same as aforesaid; that the said invention having been so communicated to him as aforesaid, *Berry*, being a subject of the Queen, afterwards, to wit, on the day and year in the declaration first mentioned, in pursuance of the said retainer and employment, and as such agent of *Daguerre* and *Niepce* as aforesaid, obtained and procured the letters-patent in the declaration mentioned to be granted to him as therein mentioned, upon trust for the use and benefit of *Daguerre* and *Niepce*, so then being such aliens and resident and domiciled as aforesaid, and not for the use or benefit of him, *Berry*; that, until the making of the indenture of assignment in the declaration mentioned, he, *Berry*, always held the said letters-patent in trust for the use and benefit of *Daguerre* and *Niepce*, so being such aliens and domiciled as aforesaid, and no otherwise; and that therefore the said letters-patent were and are void — verification.

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To this plea the plaintiff demurred, assigning for causes — that the plea neither traversed, nor confessed and avoided, any material allegation in the declaration — that it confessed, without avoiding, the causes of action in the declaration, inasmuch as it expressly admitted that the invention was new within this realm, and *Berry* the true and first inventor thereof, within the statute, and impliedly that all the other allegations of the declaration were true and sufficient, and yet did not allege any matter or thing in avoidance of the allegations and causes of action in the declaration — that it was argumentative, in this, that it was an argumen-

Special demurrer to the fifth plea.



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tative denial of the novelty of the invention within this realm, or that *Berry* was the true and first inventor within the statute, or of both those propositions — that it was double, in this, that it attempted in and by one and the same plea to put in issue two material facts, to wit, that the invention was new within this realm, and that *Berry* was the true and first inventor thereof within this realm, within the statute — that it was tricky, ambiguous, double, multifarious, and uncertain, in this, that it no where in or by the plea appeared whether it was intended for an argumentative denial of both or of one or other, and, if of one only, of which of the material facts above mentioned, that is to say, of the novelty of the invention within the realm, and that *Berry* was the true and first inventor thereof within this realm, or whether it was intended to avoid the causes of action in the declaration alleged, and by the plea confessed and admitted, on the ground that such letters-patent as in the declaration alleged, could not be held in trust at all, or that they could not be taken out or held in trust for an alien, or on some other and what ground, and also that the plea tended to an immaterial issue, inasmuch as, if the invention was new within the realm, and *Berry* was the true and first inventor within this realm, then it was wholly immaterial whether, when, how, to what extent, and by whom the same was or might have been invented, discovered, or made known in parts beyond the seas, or whether, in what manner, to what extent, and upon what terms and conditions, if any, such invention or discovery might by the inventor, or any other person, have been communicated to *Berry* — that the plea, being substantially a traverse, ought to have concluded to the country, and not with a verification — that it did not appear in or by the plea, nor was it possible with sufficient or any certainty to infer or collect therefrom, whether it was in-



tended therein and thereby to deny some material allegation of the declaration, and, if any, what, or whether it was intended to allege new matter in avoidance of the causes of action in the declaration stated and alleged, and, if so, what new matter, or whether it was intended to raise a question of fact to be tried by a jury, and, if so, what question, or a question of law to be determined by the court, and, if so, what question, &c.

Joinder.

Sixth plea — that *Daguerre* having invented the invention in the declaration mentioned, and *Daguerre* and *Niepce* having knowledge of the said invention, and of the nature thereof, and in what manner the same was to be performed, and having used, exercised, and practised the same in *France*, as in the fifth plea mentioned, they, *Daguerre* and *Niepce*, afterwards, and before the making of the said letters-patent, to wit, on the 1st of *June*, 1839, retained and employed *Berry* as their agent, for the purpose, and on the terms, in the fifth plea in that behalf mentioned; that *Berry* then accepted of such retainer and employment; that, in order to enable him to obtain the letters-patent as such agent, they, *Daguerre* and *Niepce*, before the making of the said letters-patent, to wit, on &c., communicated to *Berry* the nature of the invention, and in what manner the same was to be performed, and he then and thereby, and by no other means, first became and was possessed of the knowledge thereof; that *Berry* was the true and first inventor of the invention mentioned in the declaration, in the way and sense, and by the means mentioned and explained in the fifth plea, and not in or by any other way, sense, or means whatsoever; that *Berry*, being a subject of the Queen, afterwards, to wit, on the day and year in the declaration first mentioned, in pursuance of his said retainer and employment, and as such agent as aforesaid, obtained and procured the said

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letters-patent to be granted to him as in the declaration mentioned, on such trust as in the fifth plea mentioned, and, until the making of the indenture of assignment in the declaration mentioned, always held the said letters-patent on such trust as aforesaid; that, before *Berry* applied for or obtained the said letters-patent, and while *Daguerre* and *Niepce* had such knowledge of the invention and of the manner of performing the same as aforesaid, to wit, on the 14th of *June*, 1839, by a certain agreement duly made in *France*, between M. *Duchatel*, the secretary of state of *Louis Philippe*, then King of the French, for the home department of *France*, duly authorized in that behalf, of the one part, and *Daguerre* and *Niepce*, then being subjects of that kingdom, and resident therein, of the other part, *Daguerre* and *Niepce* assigned and made over to the said secretary of state, on behalf of the said government, a certain process of one M. *Niepce*, sen., with its improvements by *Daguerre*, and also the last process of *Daguerre*, for fixing the images of the camera obscura, including therein the invention in the said letters-patent mentioned, and thereby bound themselves to place in the hands of the minister of the home department of the said government a sealed packet containing the exact and complete history and description of the said process, including the said invention; and it was thereby agreed that M. *Arago*, a member of the French chamber of deputies, and of the Academy of Sciences, who then already had knowledge of the said process, should previously verify all the writings in the said deposit, and should certify their correctness; that the deposit should not be opened, nor the description of the process given to the public, till after the adoption of the bill therein mentioned, and then *Daguerre* should, if required, operate in the presence of a commission named by the said secretary of state; and by the said



agreement *Daguerre* made over in addition, and engaged to give in like manner information in, the process of painting and optic which distinguished his invention of the diorama; and it was thereby agreed that he should be bound to publish all the improvements which, from time to time, he might make in each and all of the said inventions; and, as the price of the rights so given up as aforesaid, the said minister for the home department of the said government thereby engaged to demand from the chamber of peers and of deputies, being two of the legislative bodies of the said kingdom of *France*, for *Daguerre* an annual pension for life of 6000 *francs*, and for *Niepce* an annual pension for life of 4000 *francs*; and they, *Daguerre* and *Niepce* respectively thereby agreed to accept such pensions respectively; and it was thereby further agreed, that, in case the said chambers should not pass, during the then present session, the bill granting the said pensions, that agreement should become null and void; and the said deposits should be returned to *Daguerre* and *Niepce* unopened; and that that agreement should be registered on payment of one *franc*: that, by virtue of that agreement, and of the laws of *France*, the invention in the declaration mentioned then became and was the property of *Louis Philippe*, so then being King of the French as aforesaid, in right of his crown, subject, however, to the said provision for making void the said agreement in that behalf above mentioned, and remained and continued the property of the said *Louis Philippe*, in right of his crown, until and at and after the time of the making of the letters-patent in the declaration mentioned; that, after the making of the said agreement, and in pursuance thereof, and before the granting of the letters-patent, to wit, on the 15th of *June* in the year aforesaid, the said secretary of state of the said government did demand from the said chambers of peers and deputies the pensions for *Da-*

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*guerre* and *Niepce* mentioned in the said agreement in that behalf, and presented a bill to the said chamber of deputies for approving the said agreement, and granting the said pensions to *Daguerre* and *Niepce* according to the said agreement; and that such bill, approving the said agreement, and granting the said pensions, afterwards, and during the said session of the said chambers mentioned in the said agreement, and before the granting of the said letters-patent, to wit, on the 12th of *August*, 1839, duly passed the said chambers of peers and deputies, and received the assent of *Louis Philippe*, then King of the French, and then and thereby became and was, and still remained, a law of the said kingdom of *France*; that, by reason of the premises, the said King of the French, upon the passing of the said bill into a law, as aforesaid, became and was, and thence continually had been and was, entitled by the laws of his said kingdom, by himself and his agents, and his subjects of the said kingdom, to use, exercise, vend, and publish the said invention, as well in the said kingdom of *France*, as in the United Kingdom of *Great Britain* and *Ireland*, and in any other country or place where the said King should think proper to permit or authorize the same, without the hindrance or molestation by, or licence from *Daguerre* and *Niepce*, or either of them, or any of their agents, or the assigns of them or their agents; wherefore the said letters-patent had been and were void, and of no effect — verification.

Special demurrer to the sixth plea.

Demurrer to the sixth plea, assigning causes substantially the same as those assigned in the demurrer to the fifth plea. Joinder.

Seventh plea.

Seventh plea — that *Daguerre* having invented the said invention, and having, together with *Niepce*, had knowledge thereof, and of the manner of performing the same, and having exercised and practised the same in manner and form as in the fifth plea mentioned, and



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*Berry* having been so retained and employed, and having accepted such retainer and employment, as in that plea mentioned, and *Berry* having first become possessed of the knowledge of the said invention, as in that plea mentioned, and being such true and first inventor only as in that plea mentioned and explained, he, *Berry*, also as such agent, afterwards, to wit, on the day and year in the declaration first mentioned, in pursuance of his said employment, obtained and procured the said letters-patent to be granted to him in trust, and held the same in trust, in manner and form as in the fifth plea mentioned ; that, before *Berry* applied for or obtained the said letters-patent, to wit, on the day and year in the said sixth plea in that behalf mentioned, the said agreement and assignment therein mentioned was made in *France*, between the said *M. Duchatel*, the said secretary of state of the said King of the *French*, duly authorized in that behalf, and *Daguerre* and *Niepce*, so then being subjects of that kingdom and resident therein, in manner and form as in the said sixth plea mentioned ; that by virtue of such agreement and of the laws of the said kingdom of *France*, the invention in the declaration mentioned thereupon then became and was the property of the said King of the *French*, in right of his crown, subject to the said provision for making void the said agreement, and remained and continued the property of the said King of the *French*, in right of his crown, until and at the several times of the making of the said letters-patent, and of the publication and dedication of the said invention hereinafter mentioned ; that the said secretary of state of the said King of the *French* having demanded the said pensions, and presented the said bill to the said chamber of deputies, and the said bill having passed the said chambers of peers and deputies, and received the assent of the said King of the *French*, in manner and form as in the said sixth plea alleged, the said bill thereupon then became and was, and still remained, a law of the



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said kingdom of *France* : and, by reason of the premises, the said King of the *French*, by the laws of the said kingdom, upon the passing of the said bill into a law, became and was entitled, in right of his crown, to publish, bestow, and dedicate the said invention, and the right of using, practising, and vending the same, and to grant such licence, permission, and authority as thereafter mentioned to have been done by him, and so remained and continued until and at the several times thereafter mentioned ; that the said King of the *French* being so possessed of the said invention, and so entitled as aforesaid, he the said King, in right of his crown, after the making of the said agreement and assignment, and the passing of the said bill into a law as aforesaid, and long before the making of the said assignment from *Berry* to the plaintiff, to wit, on the 19th of *August*, 1839, in the said kingdom of *France*, openly published and made known the said invention, and the manner of performing the same, to the people of *France*, for the use and benefit of that people, and of all other nations and people in the world, and openly and publicly bestowed and dedicated the said invention, and the right of using, practising, and vending the same, as a free gift and benefaction upon, to, and for the use of all mankind, without limitation or restriction, and gave, published, and granted his full and free and royal licence, permission, and authority, to all persons whatsoever, in any nation, to use, practise, and vend the said invention at their free will and pleasure ; whereby, according to the laws of *France*, the defendants then became and were, and ever since had been, entitled to use, exercise, and vend the said invention in any country or place, at their free will and pleasure, without the leave or licence or hindrance of *Daguerre* and *Niepce*, or either of them, or of any of their agents, or any of the assigns of them or their agents ; wherefore, the defendants, at the said



times when &c., committed the supposed grievances in the declaration mentioned, as they lawfully might for the causes aforesaid — verification.

Demurrer to the seventh plea, assigning causes substantially the same as those assigned in the demurrer to the fifth plea. Joinder.

Tenth plea — that the title and description of the invention in the declaration mentioned, was and is expressed in the said letters-patent in the words following, and in no other manner; (that is to say,) “A new *or* improved method of obtaining the spontaneous reproduction of all the images received in the focus of the camera obscura;” and that therefore the said letters-patent had been and were void in law — verification.

Demurrer to the tenth plea, assigning for causes — that it neither traversed nor confessed and avoided any material allegation in the declaration — that it confessed the causes of action in the declaration alleged, and every part thereof, without in any way avoiding the same, or alleging any matter or thing whatsoever in excuse, justification, or discharge of the acts and grievances in the declaration alleged, and in and by that plea admitted to have been committed by the defendants — that it was insufficient, in this, to wit, that it was an argumentative denial that the invention was the subject-matter of letters-patent — that it no where appeared in or by that plea, nor could it be inferred therefrom with sufficient or any certainty, what was the invention for which the said letters-patent were granted — that it was circuitous and argumentative, in this, to wit, that, if it at all answered the matters in the declaration contained and alleged, it did so by a circuitous and argumentative denial of the sufficiency of the specification in the declaration alleged to have been inrolled, and of *Berry's* compliance with the proviso in that behalf in the said letters-patent contained — that, being virtually a traverse,

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the plea ought to have concluded to the country, and not with a verification — that it tended to an immaterial issue, neither traversing any material allegation of the declaration, nor stating any fact upon which a material traverse could be taken — that it was double, uncertain, dubious, and ambiguous, and also argumentative and circuitous, and tended to delay the issue, in that it did not in any wise thereby or therefrom appear whether it was intended therein and thereby to deny the sufficiency of the specification in the declaration alleged to have been inrolled, and of *Berry's* compliance with the proviso in that behalf in the said letters-patent contained, or to deny the correspondency of the title and the invention thereby and thereunder described, claimed, and granted, with the said specification and the invention therein and thereby described and claimed, or to deny both of the last-mentioned propositions, or to allege or deny some other, and, if so, what, matter or thing; and that, if it was intended in and by that plea to deny either of the two last-mentioned propositions, then such denial should have been made by an appropriate traverse, concluding to the country, and whereupon issue might have been taken — that, if it was intended in and by the plea to deny both of the two last-mentioned propositions, then it was double, as offering two several answers to the causes of action in the declaration alleged — that it was uncertain, dubious, and ambiguous, in this, moreover, that it did not in or by the plea appear, nor was it possible with sufficient or any certainty to infer or collect therefrom, whether it was intended therein or thereby to deny some material allegation of the declaration, and, if any, what, or whether it was intended to allege new matter in avoidance of the causes of action in the declaration stated, and, if so, what new matter, or whether it was intended to raise a question of fact to be tried by a jury, and, if so, what



question, or a question of law to be determined by the court, and, if so, what question, &c. Joinder.

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The demurrers came on for argument in *Easter term* last.

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Sir *T. Wilde*, Serjt. (with whom were *Ogle* and *Webster*), in support of the demurrers. The fifth plea in substance states that one *Daguerre* was the true and first inventor of the invention the infringement of which is complained of, that he and one *Niepce* used, exercised, and practised the same in a foreign country, to wit, in *France*, that *Daguerre* and *Niepce* were aliens born and resident in *France*, that they employed *Berry*, as their agent, to procure the letters-patent in the declaration mentioned, that, in order to enable him to obtain the letters-patent, *Daguerre* and *Niepce* communicated to *Berry* the nature and particulars of the invention and in what manner the same was to be performed, that *Berry* was no otherwise the true and first inventor than by having such communication made to him as aforesaid, and by his being the first person in the United Kingdom who acquired or brought in or into the same the knowledge of the said invention and the manner of performing the same, and that *Berry* obtained the letters-patent and held the same in trust for *Daguerre* and *Niepce*, so being such aliens, and not for his own use or benefit. The plea is a mere argumentative traverse of the allegation that *Berry* was the true and first inventor, which is a material and indispensable allegation. [*Erle*, J. The first introducer of a new manufacture into the kingdom, is an inventor within the statute of *James*. The question is, whether an alien is within the rule.] According to the special circumstances, an introducer may or may not be an inventor within the statute. The plea is open to the same remark, in so far as it is designed to raise the question of novelty. Another defence intended to be presented by this plea is, that a

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patent cannot be obtained by one person in trust for another. A further defence presented, is, that it cannot be obtained in trust for an alien. Each of these might and ought to have formed the subject of a distinct plea, each raising a separate and distinct defence, and not being a mere combination of facts together amounting to one single defence. The plea, therefore, is argumentative and multifarious: and, as it traverses matter alleged in the declaration or necessarily implied, and introduces no new matter, it should have concluded to the country, and not with a verification. There is no authority for saying that a patent may not be held in trust: and the circumstance of the *cestui que trust* being an alien can make no difference. The point whether a patent was absolutely void by reason of its being held in trust for an alien *enemy*, was raised at nisi prius in the case of *Bloxam v. Elsee* (a), and reserved by *Abbott*, C. J.; but the decision of the court ultimately turned upon another point. (b) In the case of an alien enemy, the law intercepts his remedy pending hostilities, or, it may be, avoids the contract: but the like disability does not attach to the subjects of a foreign state in amity with this country. [*Cresswell*, J. The Crown may grant a licence to an alien to hold lands. (c)] A very large proportion of the inventions for which patents are

(a) 1 C. & P. 558., R. & M. 187.

(b) See 6 B. & C. 169., 9 D. & R. 215.

(c) By the 4th section of the 7 & 8 Vict. c. 66. (which received the royal assent on the 6th of August, 1844), it is enacted, "that, from and after the passing of this act, every alien, being the subject of a friendly state, shall and may take and hold, by purchase, gift, bequest, representation, or otherwise, every species of personal

property, except chattels real, as fully and effectually, to all intents and purposes, and with the same rights, remedies, exemptions, privileges, and capacities, as if he were a natural-born subject of the United Kingdom." As to the previous state of the law with respect to the capacity of aliens to hold chattels real, see *Reve v. Love- mere*, 1 Wms. Saund. 1, and notes thereto: and see *post*, p. 126. n. (a)



obtained in this country, are brought to perfection by means of the capital of third persons. Neither the interest of the public, nor any principle of common law or decided case, is at all opposed to the vesting of an interest in a patent in trust for a third person, even though an alien. Some of the most valuable patent rights now in existence are the property of Americans. The circumstance of the invention being well known and in common use in a foreign country, is no bar to the validity of a patent here: the man who first makes it known within this realm is the true and first inventor within the statute of *James*. In *Edgeberry v. Stephens* (a) it was agreed by *Holt*, C. J., and *Pollexfen*, J., that "a grant of a monopoly may be to the first inventor by the 2 Jac. 1.; and, if the invention be new in *England*, a patent may be granted, though the thing was practised beyond sea before; for, the statute speaks of new manufactures *within this realm*; so that, if they be new *here*, it is within the statute; for, the act intended to encourage new devices useful to the kingdom, and, whether learned by travel or by study, it is the same thing." The invention which was the subject of the patent in *Stead v. Williams* (b), was proved to have been previously put in practice in *Russia*: and galvanized iron, which was the subject of the patent in *Patteson v. Holland* (c), was proved to have been for some years in use in *France*. The *Case of Monopolies* — *Darcy v. Allin* (d) — and the statute 5 G. 2. c. 8., for extending the term of *Lombe's* patent "for discovering and introducing the arts of making and working the three capital Italian engines for making organzine silk," and "for preserving the invention for the benefit of this kingdom,"

(a) 2 Salk. 447.

(b) 7 M. &amp; G. 818., 8 Scott, N. R. 449.

(c) In C. P., now (T. V. 1847.) standing for judgment.

(d) 11 Co. Rep. 84. (set out,

1 Webster, P. C. 1.), Noy, 178.

(set out, 1 Webster, P. C. 5.; cited, *ib.* 29. 411.)

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shew that the law gives as much effect to the *introduction* as to the *invention* of a new manufacture.

Many of the foregoing remarks apply equally to the sixth and seventh pleas. The sixth plea in substance states, that, prior to the grant of these letters-patent, the original inventor assigned the benefit of his invention to the King of the French; and it is assumed that he is thereby estopped from the exclusive right to practise it in this country. How can a patent granted to the first introducer of a new manufacture into *England* be affected by any contract the party may have entered into in a foreign country? Do the facts stated in this plea in any degree detract from the benefits that may be supposed to result to the commerce of this country from the introduction of the invention? When a patent is granted here for the introduction of a new manufacture from abroad, does the merit of the introducer depend upon whether the invention is the subject-matter of a patent in the foreign country, or is it open to all its subjects? Is the foundation of the objection to this patent, that the party on whose behalf it has been obtained, is acting in contravention of his contract with *Louis Philippe*? Would that avoid the patent? Clearly not. The court cannot take notice of the instrument executed abroad. The only substantial difference between the sixth and the seventh pleas is, that the latter alleges that *Louis Philippe*, after the assignment to him of the invention in question, openly and publicly dedicated and made it known to all the world. Whatever may be the effect of such dedication in *France*, no right can accrue therefrom to the defendants in this country.

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With respect to the tenth plea, it will be contended on the part of the defendants that the title of the letters-patent is, upon the face of it, bad for ambiguity. The patent is for "a new or improved method of obtaining



the spontaneous reproduction of all the images received in the focus of the camera obscura ;” that is, their reproduction by a new or improved method. If the method of reproduction be new and not an improvement, or an improvement but not new, the patent would clearly be bad : it must be both. The court will make every reasonable intendment in favour of the patent. Is the objection, that it is called a method ? It is not limited to that : it is for the reproduction of the images received in the focus of the camera obscura, by a certain method ; which is the most apt and proper mode of expressing it. The title, therefore, is perfectly good : *Neilson v. Harford* (a) ; *Nickels v. Haslam*. (b)

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*Channell*, Serjt. (with whom were *W. R. Grove* and *J. Brown*), *contra*. By the fifth section of the 21 Jac. 1. c. 3. it is declared and enacted, “ that any declaration before-mentioned (c) shall not extend to any letters-patent and grants of privilege, for the term of one and twenty years, or under, theretofore made, of the sole working or making of any manner of new manufacture within this realm, to the first and true inventor or inventors of such manufactures, which others, at the time of the making of such letters-patent and grants, did not use, so they be not contrary to the law, nor mischievous to the state, by raising the prices of commodities at home, or hurt to trade, or generally inconvenient, but that the same shall be of such force as they were or should be if this act had not been made, and of none other : and, if the same were made for more than one and twenty years, that then the same, for the term of one and twenty years only, to be accounted from the date of the

(a) 8 *M. & W.* 806., 1      (c) In section 1.  
*Webster*, P. C. 295.

(b) 7 *M. & Gr.* 378., 8  
*Scott*, N. R. 97.



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first letters-patent and grants thereof made, shall be of such force as they were or should have been if the same had been made but for the term of one and twenty years only, and as if this act had never been had or made, and of none other." And the sixth section declares and enacts, "that any declaration before-mentioned shall not extend to any letters-patent and grants of privilege for the term of fourteen years, or under, thereafter to be made, of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor and inventors of such manufactures, which others, at the time of making such letters-patent and grants, shall not use, so as also they be not contrary to the law, nor mischievous to the state, by raising prices of commodities at home, or hurt of trade, or generally inconvenient; the said fourteen years to be accounted from the date of the first letters-patent, or grants of such privilege, hereafter to be made, but that the same shall be of such force as they should be if this act had never been made, and of none other." The plaintiff here, upon the face of his declaration, brings himself within the words of the statute, alleging himself, generally, to be the true and first inventor. But, taking the declaration and the fifth plea together, it appears that *Berry* is not the true and first inventor in the literal sense of the words, but that he claims to be an importer or introducer of the invention in such a sense as to entitle him, within the statute, as explained by the decided cases, to call himself an inventor. Assuming, then, that a first importer of a new manufacture may take out a patent in this country as an inventor, and may declare in this general form, the cases would seem to shew that he must at least be a *meritorious* importer. The substance of the fifth plea is, that *Daguerre* was the inventor, that he and one *Niepcé* practised the invention in *France*, and that, they being



aliens, the patent was taken out by *Berry* in trust for them. The merit of the invention belongs to *Daguerre*, and not to *Berry*, the patentee. The case of *Edgeberry v. Stephens* by no means excludes the notion that merit is in some degree the foundation of the grant. Lord Chief Justice *Eyre* in *Boulton v. Bull* (a), speaks of that case as having established "that the first introducer of an invention practised beyond sea shall be deemed the first inventor." And *Pollock*, C. B., in delivering the judgment of the court in *Chappell v. Purday* (b), says: "Under the stat. 21 Jac. 1. c. 3., against monopolies, the sixth section, which leaves as they stood at common law all the letters-patent for fourteen years, of new manufacture, granted to the first inventors, it has been decided that an *importer* is within the clause, and, if the manufacture be new in the realm, he is an inventor, and may have a patent." (c) In the case of *The Cloth-workers of Ipswich* (d), in the 12 Jac. 1., it was resolved, that, "if a man hath brought in a new invention and a new trade within the kingdom, in peril of his life, and consumption of his estate or stock, &c., or, if a man hath made a new discovery of anything; in such cases, the King, of his grace and favour, in recompense of his costs and travail, may grant by charter unto him that he only shall use such a trade or trafique for a certain time, because at first the people of the kingdom are ignorant, and have not the knowledge or skill to use it." At common law, the King could not grant a monopoly, except for an adequate consideration; which consideration was, merit in the grantee, and utility to

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(a) 2 H. Blac. 491.

(b) 13 M. &amp; W. 318.

(c) "Though," adds his lordship, "he is not the assignee of the foreign inventor, and though he may be a foreign-

er himself, if the crown chooses to grant him a patent. The authority for this is to be found in *Edgeberry v. Stephens*."

(d) Godbolt, 252.



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the public. [*Creswell*, J. If a foreigner communicates to an Englishman some useful invention known only abroad, the latter may take out a patent for it here: but what *merit* does he possess to entitle him to the grant?] In that case, the disclosure of the invention would have been made to the patentee for his own personal benefit. In the present case, however, *Berry* is neither an inventor nor an importer. He has no interest in the subject-matter of the patent. He is a mere agent. Assuming, though the point has never been solemnly determined, that a grant of a patent to a foreigner would be good, it ought to be taken out in the name of the party really interested. Formerly, a party petitioning for a patent was required to file an affidavit that *he* was the true and first inventor of the invention within the kingdom, and that the same was not in use by any other person or persons therein, to the best of his knowledge and belief. The statute 5 & 6 W. 4. c. 62. s. 11. has now substituted a declaration for the affidavit (*a*): but still the public have a right to the security of this solemn declaration by *the party taking out the patent*, that he is the true and first inventor. *Tindal*, C. J., in delivering the judgment of the court in *Crave v. Price* (*b*), observing upon *Darcy v. Allin* (*c*), says: "The case of monopolies states the law to be, that, where a man, by *his own charge or industry*, or by *his own wit or invention*, brings a new trade into the realm, or any engine tending to the furtherance of a trade, that never was used before, and that was for the good of the realm, the King may grant him the monopoly of a patent for a reasonable time." It is sub-

(a) See the form, *Webster on Patents*, p. 67.

(b) 4 M. & G. 580., 5 Scott, N. R. 338.; set out, 1 *Webster*, P. C. 893.

(c) 11 Co. Rep. 84. (set out, 1 *Webster*, P. C. 1.), *Noy*, 178., (set out, 1 *Webster*, P. C. 4.; cited, *ib.* 29. 411.)



mitted, therefore, that *Berry* was not a *meritorious* importer of this invention, and, consequently, not an inventor within the meaning of the statute; and that, if *Berry* and *Daguerre* and *Niepce* are to be identified in interest, the patent is open to the objection that it was not taken out by and in the name of the true inventor. Then, if this be taken to be a plea simply traversing that *Berry* was the true and first inventor of the invention in the declaration mentioned, it would undoubtedly have been bad for argumentativeness. But the plea does not, in direct terms, deny that *Berry* was the true and first inventor. The declaration not shewing that *Berry* derived his knowledge by means of a communication from a foreigner, but alleging generally that *Berry* was the true and first inventor, the plea gives colour to that statement, and proceeds to shew, that, though possessed of the information by means of a communication from abroad, and so in one sense an inventor, yet that the patent was not taken out by *Berry* for his own benefit, but for that of a third person, a foreigner, whose name was not disclosed. [*Tindal*, C. J. You might have concluded with a special traverse — without this that the said *Miles Berry* was the true and first inventor of the invention in the declaration mentioned.] That would have put in issue the invention only.

With regard to the sixth and seventh pleas, it is not meant to be contended that the law of *France* has any extra-territorial operation. In *Chappell v. Purday* (a), it was held that a foreign author, residing abroad, who composes and publishes his work abroad, has not, at common law, or under the statutes 8 *Ann.* c. 19. and 54 G. 3. c. 136., any copyright in this country; and therefore a person to whom he transfers abroad, by an instrument not under seal — but which is valid accord-

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(a) 14 *M. & W.* 303.



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ing to the law of that country — the copyright of the work in *England*, has no right of action against a British subject who afterwards publishes the work in *England*. Here, the patent is taken out by *Berry* as agent for *Daguerre* and *Niepce*, for an invention, their interest in which they had previously assigned for a valuable consideration to a third person. Such a person clearly has not that degree of interest in the subject-matter as will enable him to sustain a patent. [*Tindal*, C. J. A man may take out a patent in this country and in *France* also for the same invention. What more have these parties done?] The inventor having received a valuable consideration for the entire abandonment of the benefit of his discovery to all the world, he can no more be permitted to set up an exclusive privilege in this country than he could in *France*. Suppose, instead of disposing of the invention to the King of the French, *Daguerre* and *Niepce* had sold it to an Englishman, and had afterwards taken out a patent in this country; could they have restrained their vendee from the use of the invention here? [*Tindal*, C. J. If the assignment made by *Daguerre* and *Niepce* to the King of the French was such as to preclude them from taking out a patent in *England*, that might be a good answer. That, however, does not appear to be the case.] In pleading the law of a foreign country, it is pleaded as matter of fact; and, in pleading matter of fact, the party pleading is not bound to shew how the effect he relies on is brought about. (a) The sixth plea contains a positive allegation that the invention in question is no longer the property of the original inventors: and the seventh plea places the defendant pretty much in the

(a) Except where the legal character of the effect produced, depends upon the nature of the instrument by which it is produced. And see 3 *M. & G.* 780. n.



situation of a licensee of the King of the French; alleging not only a complete and entire publication, but a general licence on the part of an individual who has acquired the sole property in the invention, authorizing all the world to use it. If such a licence can be pleaded at all, the seventh plea is properly framed to set it up.

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The tenth plea was intended to raise the question of the validity of the patent as depending on its *title*. The patentee might have been entitled to a patent for a new method of producing a known manufacture, or for an improvement therein: but the title should shew with reasonable precision whether the patent is taken out for a new manufacture, or merely for a new or an improved method of producing known results — whether the patentee means to claim entire novelty for his invention, or to limit his claim to some improvement in an old method. (a) [*Cresswell, J.* If *part* of the method be new, so as to produce a result that as a whole is new, surely it may be called a new or improved method. If the method be altogether new, may it not be properly called an improved method? They seem to be convertible terms.]

Sir *T. Wilde*, Serjt., in reply. The argument in support of the fifth plea amounts to this, that *Berry*, though the person who first introduced a new manufacture into this country, is not a *meritorious inventor* within the statute 21 *Jac.* 1. c. 3. It is but an argumentative traverse of the allegation in the declaration that *Berry* was the true and first inventor. [*Erle, J.* The argument of my brother *Channell* is, that this plea is not a traverse of the allegation that *Berry* was the true and first inventor, because he is, in a certain sense, an inventor; but that it confesses the invention, and

(a) See *Cook v. Pearce*, 13 *L. J.*, *N.S.*, *Q. B.*, 189.



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avoids it, by shewing circumstances whence it is sought to be inferred that *Berry* is not a *meritorious* invention. The same sort of argumentative traverse was attempted in *Muntz v. Foster* (a), and *Stocker v. Warner* (b), as other branches of the declaration. In the former, the declaration — setting out the letters-patent, with the usual proviso, “that, if the grantee should not particularly describe and ascertain the nature of his invention and in what manner the same was to be performed by an instrument in writing under his hand and seal, and cause the same to be inrolled in the high court of Chancery within six calendar months next and immediately after the date of the said letters-patent, then those letters-patent, and all liberties and advantages whatsoever thereby granted, should utterly cease, determine, and become void” — averred that the plaintiff did, in pursuance of the said proviso, and of the said letters-patent, by an instrument in writing under his hand and seal, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be and might be performed, and afterwards, and within six calendar months next and immediately after the date of the said letters-patent, caused the said instrument in writing to be inrolled in Chancery. The defendant, in his sixth plea, after stating the above proviso, averred that the plaintiff caused to be inrolled in Chancery a certain instrument in writing in the words, and to the effect, following — setting it out *in hæc verba* — and that the plaintiff caused to be inrolled in Chancery, within six months &c., no instrument in writing other than and except the said instrument in writing thereinbefore set forth and contained whereby and by reason of the premises the said letter

(a) 6 *M. & G.* 734., 7 *Scott*,  
*N. R.* 471., 1 *D. & L.* 787.

(b) *Ante*, Vol. I., p. 148.



patent in the declaration mentioned ceased and determined, and became and were of no force and effect — concluding with a verification. And this plea was held bad, on special demurrer, as being an argumentative traverse of the inrolment alleged in the declaration. So, in *Stocker v. Warner*, to a declaration in case by *A.* against *B.*, for the infringement of a patent for “improvements in pumps,” setting out the grant of the letters-patent to *A.* in 1837, and a disclaimer of part of the specification in 1844, and charging a subsequent making and vending, &c., of *A.*’s invention by *B.* — *B.* pleaded, that, after the making of the letters-patent, and before the disclaimer, *C.* obtained a patent for “improvements in water-closets and stuffing-boxes applicable to pumps and cocks;” that, after the grant of the letters-patent to *C.*, and before *A.*’s disclaimer, *C.* granted a licence to *B.* to make, use, &c., his invention, so far as the same was applicable to stuffing-boxes applicable to pumps; that *B.* had made and sold divers large quantities of pumps under the said licence, and that the grievances in the declaration were the making, using, &c., as aforesaid, the said improvements in pumps, for which the said letters patent had been granted to *C.*, and the said licence granted to *B.*: and the plea was held bad, for not sufficiently confessing and avoiding the matters charged in the declaration. The trouble and expense incurred by the patentee in perfecting his invention, form no part of the consideration for the grant of the letters-patent. This was discussed in *Crane v. Price*, where *Tindal*, C. J., in delivering judgment, observes that, “in point of law, the labour of thought, or experiments, and the expenditure of money, are not the essential grounds of consideration on which the question whether the invention is or is not the subject-matter of a patent, ought to depend; for, if the invention be new and useful to the public, it is not

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The plaintiff demurred specially to this plea; but we think it unnecessary to advert to the causes assigned by him for demurrer, as we think the plea bad in substance.

The defendants contended, that, upon the facts disclosed in this plea, the letters-patent are void, upon one of two grounds, viz. either that *Berry* was not the true and first inventor within the meaning of the statute of *James*; or that a patent taken out in *England* by an Englishman in his own name, in trust for foreigners residing abroad, is void in law.

As to the first objection, it was not denied, on the part of the defendants, that a person who has learned an invention abroad, and imported it into this country, where it was not used or known before, is the first and true inventor within the statute. The cases decided before the statute prove that grants by the crown to persons who have brought any new trade into the realm, were good at common law: see the *Case of Monopolies* (a), and the case of *The Clothworkers of Ipswich* (b). And the exception contained in the 6th section of the statute in favour of grants of privilege for the sole working of any new manufacture within the realm, was made in affirmance of the common law, introducing no other alteration than the restriction in point of time for which such grants might extend. And, further, the case of *Edgeberry v. Stephens*, which was decided long after the statute was passed, is an express authority that the statute “intended to encourage new devices useful to the kingdom; and, whether learned by travel or by study, is the same thing.”

But the argument on the part of the defendants has been, that *Berry* was not a person who imported this invention into *England*, within the meaning of the statute. It was argued, that, to come within the statute, the per-

(a) *Darcy v. Allin, Noy* (b) *Godbolt*, 252.  
*Rep.* 178., 11 *Co. Rep.* 84.



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son who takes out the patent should be the *meritorious importer*, not a mere clerk or servant or agent, to whom the communication was made for any special purpose, by the foreign inventor, as, for the purpose of enabling him to take out the patent for the benefit of such foreigner. No authority is cited for such distinction. So far as the public are concerned in interest, no such distinction is necessary. *Berry* is an Englishman, to whom the invention is communicated by a foreigner residing abroad; and *Berry* first brings the invention into *England*, and makes it public there. So far, therefore, as relates to the interest of the public, *Berry* has all the merit of the first inventor. If he has been guilty of any breach of faith in his mode of obtaining the communication, or in the mode of using it in *England*, he may or may not be made responsible to his employers abroad; but such misconduct seems to have no bearing upon the question, — as between him and a stranger (*a*), — whether the patent is void or valid. Indeed, it appears upon the plea itself that *no fraud* was committed upon his employers; for, it is expressly stated in the plea, that he was directed to take out the patent in his own name, in trust for them, and that in fact he had so done, and had held it for a certain time for their benefit.

The invalidity of the patent must therefore depend, *if at all*, upon the second ground of objection pointed out, viz. that it was taken out by *Berry* in his own name, but in trust for aliens residing abroad. Now, in support of this objection also, no authority whatever was cited. In the case of *Bloxam v. Elsee* (*b*), the point was raised at nisi prius, whether a patent could be taken out in trust for *an alien enemy*; but it became

(*a*) It was not suggested that the patent was invalid on the ground of a deceit having been practised on the crown by the suppression of the *trust*.

(*b*) 1 *C. & P.* 558., *R. & M.* 137., 6 *B. & C.* 169., 9 *D. & R.* 215.

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unnecessary to decide even that question, when the case came before the court. The case before us does not state that *Daguerre* and *Niepce* are *alien enemies*: indeed, we may take judicial notice that there is no war between *France* and *England*: and we see no reason or principle which should prevent an *alien amy*, if the crown thought proper, from receiving such a grant, either in his own name, or in the name of another in trust for him. In the case of *Chappell v. Purday* (a), the court in their judgment assume it to be clear in point of law that a foreigner may hold a patent, if the crown chooses to grant it to him. We think, for these reasons, that the fifth plea cannot be supported.

As to the  
 sixth plea.

The sixth plea, after making the several statements contained in the fifth, proceeds to allege, in substance, that, before the grant of the patent, *Daguerre* and *Niepce*, by an agreement made in *France*, between the secretary of state for the home department of the King of the French and themselves, for the considerations therein mentioned, assigned to such secretary, on behalf of the government (amongst other things), the invention mentioned and described in the letters-patent, and that, by virtue of such agreement, and by the laws of *France*, the said invention became the property of the King of the French in right of his crown, who thereby became entitled, by the laws of his said kingdom, to vend and publish the said invention, as well as in the kingdom of *France*, as in the United Kingdom of *Great Britain* and *Ireland*, and in any other country or place where he should think proper, without any licence from *Daguerre* and *Niepce*: and this plea concludes, as the last, that the letters-patent are therefore void.

To this plea also there is a special demurrer; but, without adverting to the causes assigned, it is sufficient to say we think this plea also is bad in substance.

(a) 14 M. & W. 318.



The only additional fact, besides those stated in the former plea, is, that, before the granting of the letters-patent, the inventors in *France* had assigned the invention to the King of the French, who became entitled to make it public in *France*. The plea contains no statement that he had actually published it in *France*: but, even supposing the plea to have stated it had been publicly known and exercised in *France*, we cannot think it would have made any difference as to the validity of a patent taken out in *England*. But the plea contains no denial of the allegation in the declaration, that *Berry* was the true and first inventor, within this realm, of an invention which others at the time of making the letters-patent did not use. And this allegation contains all that is necessary to support the validity of the letters-patent in respect of the granting thereof.

One argument advanced by the defendants was, that the original inventors in *France*, having, for a valuable consideration, parted with their discovery to a person in *France*, could not come to *England* and take out a patent here. No authority, again, is cited in support of this position: and it is contrary to common experience; as it is well known that the same persons have patents for the same invention, at the same time, in both countries.

There is nothing in the agreement under which the invention was sold in *France*, to restrain the original inventors from applying for a patent in *England*: such a condition might, and probably would, have been inserted, if such had been the intention of the parties: and, at all events, whatever the case might have been as between the parties to the agreement, it is not in the power of the defendants, who are perfect strangers to it, to set up such an objection under this plea, which rests upon the grant of the letters-patent being absolutely

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void. We think, for these reasons, the sixth plea must be overruled.

We have come to the same conclusion as to the seventh plea, which differs from the last only in this respect, that it alleges the King of the French to have openly published and made known the said invention, and the manner of performing the same, to the people of *France*, for the use of that people, and of all other nations and people in the world, as a free gift and benefaction for the use of all mankind; and the plea then proceeds to allege, not that the letters-patent are void, as in the former pleas, but that the defendants thereby became entitled to use the invention in any country, without the leave or licence of the plaintiff. But we think it a sufficient answer to say, that the letters-patent were not void, but, on the contrary, were valid, for the reasons given in our judgment on the two former pleas; whence it follows, as a necessary consequence in law, that the invention cannot be used in this country in direct violation of the valid grant of the crown, without the licence of the grantee.

As to the  
tenth plea.

As to the tenth plea, it is sufficient to remark that we think the objection to the title of the patent is answered by reference to the decided cases of *Neilson v. Harford* (a), and *Nickels v. Haslam* (b).

We therefore think the judgment of the court must be given, on the several pleas above mentioned, for the plaintiff.

Judgment for the plaintiff. (c)

(a) 8 *M. & W.* 806.

(b) 7 *M. & G.* 378., 8 *Scott*,  
*N. R.* 97.

(c) The issues were tried before *Wilde*, C. J. and a special jury, at the *London* sittings after *T. T.* 1847, when a verdict was found for the plaintiff

upon all the issues, except one raising a question as to the sufficiency of the description in the specification, on which issue the verdict was taken for the defendant, leave being reserved to the plaintiff to move to enter a verdict for himself.



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## BENHAM v. The Earl of MORNINGTON.

. May 27.

**D**EBT, on a bond, bearing date the 23rd of *August*, 1833, in the penal sum of 800*l*.

Plea, that the supposed writing obligatory in the declaration mentioned, was made and executed by the defendant as therein mentioned, in parts beyond the seas, to wit, at *Calais*, in the kingdom of *France*, where the defendant was then resident and domiciled, and not elsewhere; that the said writing obligatory in the declaration mentioned, was not taken, received, made, or passed by any public officer or officers of the said kingdom of *France*, authorized by the laws of that kingdom so to do, nor was the same writing written throughout by the hand of the defendant; that, although the defendant signed the said writing with his own hand, yet the defendant did not, in any part of the said writing, write with his proper hand the formula or acknowledgment styled in the *French* tongue a "*bon*" or "*approuvé*," bearing in words at length the debt or sum of money purporting to be secured or acknowledged by the said writing, nor was the defendant, at the time of the making of the supposed writing obligatory, a merchant or tradesman, artizan, husbandman, ploughman, vine-cultivator, labouring-man, or servant; and that, *by reason of the*

To debt on bond the defendant pleaded — that the bond was executed by him in *France*, where he was then domiciled; that it was not taken or passed by any public officer authorized by the laws of that kingdom, nor was it written throughout by the hand of the defendant; that, though the defendant signed the bond with his own hand, he did not write thereon with his proper hand the formula styled in the *French*

tongue a "*bon*," or "*approuvé*," bearing in words at length the sum secured, nor was the defendant at the time a merchant or tradesman, &c.; concluding that, "by reason of the premises, the bond, by the laws of *France*, never was nor is obligatory or binding on the defendant, but always was and is of no force, effect, or validity."

Held, that the plea was bad, as being a mere argumentative and inferential statement of the *French* law; which, being pleadable only as matter of fact, ought to have been distinctly and affirmatively alleged.

*Quere*, whether, supposing it to have been well pleaded, the whole of the allegations therein might have been put in issue by *de injuriâ*.



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*premises*, the said supposed writing obligatory, by the laws of the said kingdom of *France*, never was nor is obligatory or binding on the defendant, but always was and is of no force, effect, or validity — verification.

Special demurrer, assigning for causes, that the plea did not state facts with distinctness and certainty, so that the court could perceive that the writing obligatory was void according to the law of *France* at the time it was executed — that the plea merely stated, as an inference from certain preceding matters, that the writing obligatory never was binding — that the plea ought to have averred, in terms, what was the existing law in *France* at the time the writing obligatory was executed, and then, by proper averments, to have shewn facts which brought the writing obligatory within that law — that, consistently with the terms used at the end of the plea, the writing obligatory may have been binding according to the French law existing at the time it was executed, but that afterwards a law may there have passed, enacting a retrospective effect, and declaring that all previous writings not made as directed, should be deemed never to have been binding — that the defendant, if he relied on any such retrospective law, should have averred accordingly, and so that the court might see whether the same was reasonable to annul obligations which were binding according to the law existing at the time they were entered into — that the defendant had left it in uncertainty whether he relied upon an existing law, or upon such a retrospective law, by stating “the laws,” instead of the then existing laws,” at the end of his plea — that the plea was also insufficient, in not setting out the French law in terms, so that the court might see, as to persons, whether such law was intended to affect all obligations, or such only as were made between two or more natives or subjects of *France*, or whether such law was intended to include obligations between a native or subject and a foreigner, and be-



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tween two foreigners, and, as to the subject-matter, whether such law was intended to affect all obligations, or some only of a particular character recognized by the laws of *France*, or such only as derived their effect, as, a note or a promise, by being under private signature, and not including writings of a character like that of the writing obligatory in question, which did not require, and did not derive any legal effect from, signature — that the mode adopted in the plea in setting out the law of *France*, left it in uncertainty whether the defendant relied upon one, or upon more than one of each distinct fact averred as rendering the writing obligatory not binding, or whether more than one, or all, the facts averred were relied upon in combination, as having that effect — that such mode was calculated to embarrass the plaintiff in his replication, inasmuch as if he were to take issue upon the averment at the end of the plea, that, “by reason of the premises, the writing obligatory is not binding,” he might be said to have admitted the averred preceding facts, and to have tendered an issue merely upon their effect; while, if he took issue upon any one fact, he might be said to have admitted the others — that the plaintiff, by the mode adopted in the plea in setting out the law of *France*, was placed under a difficulty, if he wished to traverse the alleged law, and the alleged facts which were supposed to bring the case within it — that, if the defendant relied upon each distinct fact set out in the plea (after that of residence and domicil), as being sufficient to render the writing obligatory not binding, his plea was double — that the plea was double, for the cause last mentioned — that the uncertainty whether the defendant relied upon each such fact, or upon more than one of such facts, or upon all such facts in combination, further embarrassed the plaintiff in framing his replication, and subjected him to the risk of a demurrer for duplicity — that, in that part of the plea which followed the statement that the writing obligatory was not written



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throughout by the hand of the defendant, it was left in doubt whether the signing by the defendant with his own hand, followed by the word “*bon*” or “*approuvé*,” would have sufficed, though he were not a merchant or tradesman, artisan, husbandman, ploughman, vine-cultivator, labouring-man, or servant, or whether it was necessary, that he should have been one of such, in order to render the addition of either of such words sufficient, or whether such last-mentioned statement as to trade and calling was at all connected with the addition of the formula or acknowledgment in the plea mentioned — that the plea did not state what was the proper formula or acknowledgment mentioned in such plea to be necessary to be written by the defendant; and that the statement of the mere term in the French language designating such formula or acknowledgment, was not sufficient.

The plaintiff joined in demurrer.

*Dowling*, Serjt. (with whom was *Barstow*), in support of the demurrer. If the defendant seeks to avoid the bond by reason of the non-observance of some formalities required by the French law, he ought to have alleged it with precision and clearness, like any other fact that must be proved at the trial. This the plea in question does not do. All it states, is, that the bond was executed in *France*, and without certain formalities required by the laws of that country, and that the defendant was not a merchant or tradesman, &c.; concluding, that, by reason of the premises, the bond never was of any force or validity. The latter part of the plea is a mere conclusion of law, which is not supported by the facts previously set forth. The particular law intended to be relied on should have been set out, and then the facts to bring the case within such law. From the language of the plea as it now stands, the court has no means of judging whether or not the inference that the defendant draws, is well founded. But, assuming that



the inference deduced by the defendant from the foreign law is warranted by the premises, the plea is bad for duplicity: it negatives the defendant's compliance with the formalities of the *lex loci*, and also the fact of his being of one of the excepted classes. [Tindal, C. J. It certainly is difficult to see what issue could be taken on this plea.]

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Channell, Serjt. (with whom was J. Brown), was called upon by the court to sustain the plea. The defendant intends to shew that the bond is void by the French law. In order to do this, the French law being mere matter of fact that must be alleged and proved, the plea states the defendant's domicile in *France* at the time of the making of the bond, and then alleges that the bond was made without the observance of certain requisite formalities, and negatives the defendant's belonging to certain specified classes; and it properly concludes, that, by reason of the premises, the bond is void by the laws of *France*. If this were a case in which the law of *England* was to prevail, no doubt it would be for the court at once to pronounce whether the instrument was void or not, and the *virtute cuius* would not be traversable. But it is otherwise where the defence arises out of the law of a foreign state. [Collman, J. The plea is not the better for the allegation of the want of the formula or acknowledgment called a "*bon*" or *approuvé*."] The whole plea might be put in issue by *de injuriâ*. The defendant was bound to negative one set of circumstances, and to affirm another; and he would be bound to prove all the facts affirmatively alleged, and to give colour to all that is stated negatively. The plaintiff, therefore, might safely put in issue any one of the facts alleged. In *M'Leod v. Schultze* (a), to assumpsit on a policy of insurance, by the assignees of

. (a) 1 D. & L. 614.



1846. *P.*, a bankrupt, the defendant pleaded, to 78*l.*, parcel &c., that the policy was made in *Scotland*, and that the said sum was duly fenced and arrested, according to the law of *Scotland*, at the suit of *G.*, for a debt due to him, until sufficient caution should be found in the books of council and session, that the same should be forthcoming to *G.*; that thereupon the said sum of money became and was, according to the law of *Scotland*, in custody of the law, and subject to the order of the court of session; that such proceedings were afterwards had, that *G.* obtained final judgment; that the proceedings were regularly conducted; that the judgment was final and conclusive against the plaintiffs; and that, according to the law of *Scotland*, the plaintiffs were precluded from suing for the said sum, and were, by reason of the premises, wholly barred: and it held, on special demurrer, that the plea afforded a good defence, and that it was not necessary to set out the Scotch law. [*Tindal*, C. J. That was hardly a case adjudged; it was rather an intimation of opinion, and a recommendation to the plaintiff to withdraw the demurrer, and reply.] So far as it goes, it is a distinct intimation, that, in the opinion of the court of Exchequer, there is no necessity for setting out the foreign law. *Woodham v. Edwardes* (a) is an authority to shew that all the material allegations in a plea like this may be put in issue by *de injuriâ*. [*Cresswell*, J. The plea sets up no matter of excuse: it states facts whence an inference is sought to be drawn that the bond never had any force or validity at all.] The rule of pleading with respect to the general replication *de injuriâ* has of late been much relaxed. In *Cowper v. Garbett* (b), in debt by the payee against the maker of a promissory note, the defendant pleaded that the plaintiffs procured the de-

(a) 5 *Ad. & E.* 771.(b) 13 *M. & W.* 33.



defendant to make the note, by fraud, and that the defendant was induced to make and deliver it, by such fraud, and that there never was any consideration or value for the making and payment by the defendant of the note; and it was held that these facts were well put in issue by the replication *de injuriâ*. Pollock, C. B., in delivering the judgment of the court — after disposing in the affirmative of the question whether this form of replication was admissible in debt or indebitatus assumpsit — says: “The next question is, whether the defence in this plea is of such a description as to be traversable in this form; and we are of opinion that it is. In many cases, fraud or illegality in the original creation of the bill, coupled with averments to shew that the holder, the plaintiff, is in a situation to be affected by that fraud or illegality, have been held to be of that description. But, though these circumstances render the contract not binding, and so amount to a denial that there was a binding contract, they admit a contract in fact, and excuse its performance. But it is said there is a difference where the fraud or illegality is between the parties to the action; for, those circumstances shew that there was no binding contract; and the *dicta* of my brother Parke, in *Humphreys v. O’Connell* (a), and in *Parker v. Riley* (b), are referred to as supporting that position. In the case of *Scott v. Chappelow* (c), the court of Common Pleas, though they did not expressly decide the contrary, did not, certainly, support it; and my brother Coltman stated his opinion, that, in all cases where a contract was avoided by matter of law, the general replication was proper; and we think his view of the case is right.”

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(a) 7 M. &amp; W. 370.

(b) 3 M. &amp; W. 230.

(c) 4 M. & G. 336., 5 Scott,  
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*Dowling*, Serjt., in reply. The court will not lend its sanction to a plea that is calculated to impose so much difficulty on the plaintiff. None of the cases cited shews that the replication *de injuriâ* could properly be pleaded here. The plaintiff cannot in any way avail himself of the exceptions engrafted by the *Code de Commerce* upon the *Code Civil*.

**TINDAL**, C. J. It appears to me that this plea is bad for one of the causes assigned, viz. that it is argumentative and inferential only; whereas "every plea must be direct, and not by way of argument or rehearsal," as is laid down in *Co. Lit.* 303. *a*. It is perfectly clear, that, but for the words at the end — "by reason of the premises, the said supposed writing obligatory, by the laws of the said kingdom of *France*, never was, nor is, obligatory or binding on the defendant, but always was, and is, of no force, effect, or validity" — the plea would be no answer to the action. There is no direct affirmance of what the law of *France* is, or of any state of facts to bring this case within the operation of that law. I think the plaintiff was entitled to a distinct statement of the law and of the facts, in order that he might take the opinion of the court as to whether or not they amounted to a legal defence. If this had been a question of evidence, instead of pleading, the witness would not have been allowed to state, negatively, this or that is not in compliance with the law of *France*; but he would have been required to shew affirmatively, from his own experience, or from knowledge derived from some recognized code or book, what the law is. The entire plea, after the introductory statement of the defendant's domicile, consists of negative propositions only. With respect to the allegation that the defendant was not a merchant or tradesman, &c., how do we know that there are not other classes embraced by the exception,



that are not noticed by the plea, and to one of which the defendant may belong? I think the plea is clearly argumentative and bad. As to *M'Leod v. Schultze*, it may be observed that a case in which either party is recommended to withdraw his plea, or demurrer, and amend, cannot be considered a very strong authority: besides, the plea there consisted entirely of affirmative matter, and therefore stands clear of one the difficulties that this plea presents. In *Woodham v. Edwardes*, the objection was not taken, the plaintiff having pleaded over. Upon the whole, I think the plaintiff is entitled to judgment on this plea.

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COLTMAN, J. The plea could hardly have been held sufficient if it had alleged merely that the bond was executed by the defendant in *France*, and that, by the laws of that country, the bond was void: and, unless such a plea would be sufficient, I think the matter that is here intermediately stated would not help it. The plea should have alleged distinctly what the law of *France* is, and should then have averred facts to bring the case within it; so that the matter might be decided by the court on demurrer, if the facts did not bring the case within the French law. I am not quite satisfied that the plea is double; though it might have been so if the foreign law had been so set out as the plaintiff has a right to have it. Upon the whole, though with some hesitation, on account of the doubt suggested by the case of *M'Leod v. Schultze*, I am of opinion that the plea is insufficient, and the plaintiff entitled to judgment.

CRESSWELL, J. (a). I also am of opinion that the plea in question is insufficient. I quite agree with my

(a) *Maule, J.*, was prevented by illness from attending in court this day.



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brother *Coltman*, that a plea merely averring that the bond was executed in *France*, and was void by the laws of that country, would be bad. The French law is only to be taken notice of as any other matter of fact, and must be pleaded: it clearly would be no plea to say, that, “by reason of some fact that will hereafter be proved,” the bond is null and void. It has been insisted, on the part of the defendant, that this plea does sufficiently state what the French law is. I think there is no such clear and unambiguous statement of it as the plaintiff has a right to have upon the record: it is a mere inferential, and a very inconvenient, mode of stating what the foreign law is. If *M’Leod v. Schultze* were to be taken as a decision upon the point, I should be unwilling to determine this without more consideration: but I look upon what passed there to be merely one of those friendly hints thrown out in the course of argument, of which counsel sometimes deem it prudent to avail themselves.

Judgment for the plaintiff.

### GEORGE SMITH v. SHIRLEY.

*May 27.*

A plea justifying the breaking and entering a house, without warrant, on suspicion of felony, ought distinctly to shew, not only that there was

reason to believe that the suspected person was there, but also that the defendant entered for the purpose of apprehending him.

**T**RESPASS, for breaking and entering the plaintiff’s dwelling-house, and making a noise and disturbance therein, &c.; and also for assaulting, seizing, and laying hold of the plaintiff, and forcing and compelling him to go, and causing him to be forcibly conveyed, in custody, in and along divers public streets and highways, to a certain police-station, and there imprisoning the plaintiff, and keeping and detaining him in prison,



without any reasonable or probable cause for twenty-four hours, under a false charge that he had committed an offence punishable by law.

Plea — that, long before the times when &c. in the first and last count of the declaration respectively mentioned, and before and at the time next thereafter mentioned, certain persons, to wit, *S. Mordan* and *A. Mordan*, were possessed of a certain warehouse and premises, situate &c., from and out of which said warehouse and premises, and out of divers boxes then therein being, and out of the possession of the said last-mentioned persons, divers and very many goods and chattels of the said *S. Mordan* and *A. Mordan*, to wit, 100 ounces of gold, 400 ounces of silver, and fifty gold pen-holders, of the value of 500*l.*, had been and were, before the said times when &c., to wit, during the night of the 8th of *February*, 1845, and when and whilst the said warehouse and premises had been and were left for the night by the said last-mentioned persons, and by their servants and workmen, feloniously stolen, taken, and carried away by a certain person, or by certain persons, then and still unknown to the defendant; that the said goods and chattels so feloniously stolen, taken, and carried away as aforesaid had been and were, to wit, on the day and year last aforesaid, and before and when the said first herein-mentioned persons and their servants and workmen had so left the said warehouse and premises as aforesaid, deposited, with divers and very many other goods and chattels of inferior value, in the said boxes, safely locked and secured, and then left so safely locked and secured, in the said warehouse and premises, by divers of the said workmen of the said first herein-mentioned persons; and that there were, at the said last-mentioned time, and thence continually until and after the time of the said goods and chattels being so feloniously stolen, taken, and carried

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away as aforesaid, divers and very many other boxes being during all the time last aforesaid in the said warehouse and premises, and near and contiguous to the said boxes first herein-mentioned, the said other boxes also containing goods and chattels of great value, but not containing respectively nearly so great a value in such goods and chattels, nor goods or chattels of so great a value respectively, as the value respectively of the goods and chattels in the said boxes first herein-mentioned respectively, or as the value respectively of the said goods and chattels so feloniously stolen, taken, and carried away as aforesaid; that the said boxes first herein-mentioned, and also the said other boxes, contained respectively, during all the time aforesaid, divers quantities of brass and other metals and metallic compounds very much inferior in value to gold, and divers articles of workmanship thereof respectively, the same very much resembling gold in appearance, and not being quickly or easily distinguishable from gold, except by persons accustomed to see and examine such articles and metals and metallic compounds respectively, and to see and examine them together with gold, and to compare them therewith; that the said goods and chattels so feloniously stolen, taken, and carried away as aforesaid, were and comprised all the gold and all the articles of gold then being in the said first herein-mentioned boxes, or in the said other boxes, or in the said warehouse or premises; that the said person or persons who so feloniously stole, took, and carried away the said goods and chattels as aforesaid, must have known, and did know, just before and at the time of such stealing, taking, and carrying away, the premises and warehouse, and then must have known, and did know, where and in which of the boxes aforesaid to look for the more valuable articles as aforesaid, and then must have known, and did know, how to select the more valuable articles from



those resembling them, but of inferior value, and not easily or quickly distinguishable from gold, except by persons accustomed as aforesaid; *that divers tools and instruments ordinarily used by the plaintiff, or such as the plaintiff, to wit, for two years, until and before and at the day and year last aforesaid, used, were then, and when the said goods and chattels were so feloniously stolen, taken, and carried away as aforesaid, brought into the said warehouse and premises, and near to the said boxes first herein mentioned, and there then left by the said person or persons unknown*; that, before, to wit, for two years next before the last-mentioned time when the said goods and chattels were so feloniously stolen, taken, and carried away as aforesaid, the plaintiff had been occasionally, and from time to time, and very frequently employed by the said first herein mentioned persons, in and about the said warehouse and premises, and for divers, to wit, six months next before and at the time of the said robbery, well knew and was acquainted with the said warehouse and premises, the said boxes, the contents thereof, and the value of the brass and other metals and metallic compounds aforesaid; that one *Thomas Smith*, the plaintiff's brother, which said *Thomas Smith* then was, and thence hitherto had continued to be, in the constant habit of associating with the plaintiff, had been recently before then in the employment of the said first herein mentioned persons for a long space of time, to wit, for two years next before the day and year next mentioned, in and about their said warehouse and premises, and had been during all that time employed by the last-mentioned persons as a worker in gold and in silver, and in the said other metals and metallic compounds, until, to wit, the 1st of *February, 1845*, recently and immediately before the said time when the said goods and chattels were so feloniously stolen, taken, and carried away as aforesaid,

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when the said *Thomas Smith* was discharged from their said employment by the said persons first herein mentioned, for general bad conduct; that, for a long space of time, to wit, for six months next before and until and at the time when the said goods and chattels were so feloniously stolen, taken, and carried away as aforesaid the plaintiff appeared to be and was in a state of great poverty and destitution, but that, from and immediately after the said last-mentioned time, the plaintiff suddenly appeared to have become and to be, and he then suddenly became and was, possessed of large sums of money, and then also became and was very lavish and extravagant in his conduct and expenditure, although the plaintiff had not at any time thereafter until or at the said time when &c., other than from the said felony, acquired or gained any property or money, or had any employment, or any means of support; and the plaintiff was then, and on divers occasions from thence, to wit, for two months next before and until the said times when &c. in the first and last counts of the declaration mentioned, seen at divers public-houses, having, and shewing, and exposing to view as his own, divers and very many gold current coin of the realm, to wit, fifty sovereigns, and other moneys; that, afterwards, and while the plaintiff was possessed of the said sums of money as aforesaid, to wit, on the 14th of *May*, 1845, he the plaintiff was asked and inquired of by the defendant whether he the plaintiff was not possessed of divers sums of money, which the plaintiff then denied, although he then had and possessed them as aforesaid; that, for one week next before and at the time of the committing of the said felony, the plaintiff was near to the said warehouse and premises; that, on divers occasions, from a time long before and until the said time when the said goods and chattels were so feloniously stolen, taken, and carried away as aforesaid, to wit, for



two years next before and until the said time when the said goods were so stolen, taken, and carried away as aforesaid, the plaintiff had been taken and charged at divers and many police-stations, and before divers and many magistrates and public officers, on charges of suspicions of felony and misdemeanour ; that the plaintiff, during all that time, and thence hitherto, kept, and still keeps, the company of, and constantly associated and still associates with, divers and very many persons leading idle, dissolute, and vagabond lives, and being persons of bad character and repute for honesty and regularity of conduct ; — wherefore the defendant, well knowing the premises, and having good and probable cause of suspicion, and then vehemently suspecting the plaintiff, for the reasons aforesaid, to have been guilty of and concerned in the said feloniously stealing, taking, and carrying away of the said goods and chattels as aforesaid, did, at the said time when &c. in the first count mentioned, peaceably and quietly enter into the said dwelling-house of the plaintiff in the first count mentioned, the outer door of the said house being then opened to him by a certain person from within, to wit, the mother of the plaintiff, with a certain person, to wit, one Serjeant *Brennan*, a police-officer and constable and peace-officer of our lady the Queen, and did then give the plaintiff in charge and into the custody of the said police-officer, to safely keep him until he could be carried and conveyed before some justice assigned to keep the peace of our lady the Queen, and to hear and determine divers felonies and misdemeanours committed within the county, to wit, &c., where the said felony was committed ; that the defendant and the said Serjeant *Brennan*, so being such officer and constable as aforesaid, then, and in a reasonable time for the purpose aforesaid from entering the said dwelling-house, left the same, and then conveyed the plaintiff therefrom to the

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said police-station, as in the second count of the declaration mentioned, and until he could be carried before such justice for the purpose last aforesaid, to be further dealt with according to law, and did then and there imprison the plaintiff on suspicion of having been guilty of or concerned in the said feloniously stealing, taking, and carrying away of the said goods and chattels as aforesaid, for a certain space of time, as in the said last count in that behalf mentioned, the same being then a reasonable time in that behalf, making no unnecessary noise or disturbance in the said dwelling-house, and using no unnecessary force to the plaintiff in any way or manner; which were respectively the trespasses in the first and last counts of the declaration mentioned — verification.

Special demurrer.

Demurrer to this plea, assigning for causes, amongst others, that the plea did not shew any good, reasonable, probable, or sufficient cause for suspecting the plaintiff to have been guilty of the felony mentioned in the plea — that it did not appear with certainty in or by the plea, that the articles of gold were selected by the person or persons committing the felony, from the said other articles, or that the said articles of gold alone, and none others, were stolen on the occasion of the said felony — that the allegation in the plea that the person or persons who so feloniously stole, took, and carried away the said goods and chattels, as in the plea mentioned, must have known, and did know, just before and at the time of such stealing, taking, and carrying away, the premises and warehouse, and then must have known, and did know, where and in which of the boxes in the plea mentioned to look for the more valuable articles as aforesaid, and then must have known, and did know, how to select the more valuable articles from those resembling them, but of inferior value, and not easily or quickly distinguishable from



gold, except by persons accustomed as in the plea mentioned, was vague and uncertain, in this, that is to say, that it did not appear with certainty whether it was intended to allege that the said felony could not have been committed unless the said person or persons who committed the same had been possessed of the knowledge in the said allegation mentioned, or that the person or persons who committed the said felony shewed, in the commission thereof, such knowledge as last aforesaid; that, if the allegation was intended to have the first of the meanings aforesaid, it ought to have been shewn in the said plea how or on what account such knowledge as last aforesaid was necessary for the commission of the said felony, and how and in what way it was exercised; and, if the allegation was intended to have the second of the meanings aforesaid, the plea ought to have stated facts from which the court might fairly and reasonably infer that such knowledge had been shewn in the commission of the said felony — that the allegation in the plea, that divers tools and instruments ordinarily used by the plaintiff, or such as the plaintiff used for the space of time mentioned in that behalf in the plea, was uncertain, in this, that is to say, that it was uncertain therefrom whether the said tools and instruments were the identical tools and instruments which the plaintiff had been in the habit of using, or were merely tools and instruments of a like or similar kind — that, if it was merely intended to allege that the said tools and instruments were similar or like to tools and instruments which the plaintiff had ordinarily used, it ought to have been shewn of what kind the said tools and instruments were, and how or for what reason their being left in the said warehouse and premises as in the plea mentioned, afforded any ground of suspicion that the plaintiff had been concerned in the said felony — that it did not appear that

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the plaintiff, at the time of the felony, had any skill or knowledge to distinguish easily or quickly, or in any manner whatever, between the said articles of gold and the said other articles, or was a person who had been accustomed to see, examine, and compare, as in the plea mentioned — that what was stated in the plea of and concerning *Thomas Smith* afforded no reasonable nor any grounds of suspicion against the plaintiff — that, even if the defendant, for the reasons in the plea mentioned, had good and probable cause for suspecting, and did suspect, the plaintiff to have been guilty of and concerned in the felony; yet he had not thereby any right or authority in law to break or enter the dwelling-house of the plaintiff — that it did not appear with certainty that the outer door of the said dwelling-house was opened to the defendant by any person who had authority in that behalf — that the plea did not shew any justification for breaking and entering the dwelling-house, or for giving the plaintiff into the charge and custody of *Brennan*, or for conveying the plaintiff to the said police-station, or for imprisoning him there — and that the plea was in other respects informal and insufficient &c.

The defendant joined in demurrer.

*Talfourd*, Serjt., in support of the demurrer. There is no such reasonable certainty in this plea as to justify either of the trespasses charged in the declaration. To justify the arrest of a party, without warrant, on suspicion of felony, the circumstances must be alleged with apt and convenient certainty: general surmises of bad conduct will not suffice; *Burgess v. Beaumont* (a). And here it is to be observed, that the party taking upon himself to act on the suspicion, is not alleged to be a

(a) 7 M. & G. 962., 8 Scott, N. R. 668.



constable, or the party grieved; nor is it alleged that he acted at the request of the party grieved. Supposing the imprisonment to be well justified, there is no pretence of justification for breaking and entering the house. It is not alleged that the plaintiff, or the stolen goods, were there, or that the defendant believed them to be there: all is left in uncertainty. A private individual, even upon the strongest grounds of suspicion of felony, has no right to enter the dwelling-house of a third person, unless he has reasonable ground for believing the guilty person to be concealed there.

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*Channell*, Serjt. (with whom was *Bramwell*), *contra*. The plea well justifies the entering the dwelling-house, the outer door being open, and circumstances being stated whence a reasonable suspicion might arise that the plaintiff was there. If the plaintiff was actually in the house at the time, it was unnecessary to allege in the plea any ground of suspicion at all. Then, with regard to the imprisonment: it appears that the plaintiff had been employed upon the premises where the felony was committed, that he was seen near the spot about the time of the robbery, that tools like those used by him were found on the premises, that, having previously been in a state of extreme poverty, he was shortly afterwards seen exhibiting money and spending it recklessly. All these circumstances presented cogent grounds of suspicion that the plaintiff was concerned in the commission of the offence: and a case of suspicion necessarily compels considerable generality of statement in a plea of justification. This is not at all like the case of *Burgess v. Beaumont*. There, the defendant was seeking to justify his breach of contract by general imputations of immorality and dishonesty; and it was properly held, that, to constitute a defence on that ground, the charges must be specific.



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*Talfourd*, Serjt., in reply. The plea leaves it in doubt whether the defendant means to allege that the tools found on the premises after the robbery were the property of the plaintiff, or merely that they were tools of a general character and description similar to those used by the plaintiff, or by persons in his trade: and this uncertainty is well pointed out by the demurrer. [*Tindal*, C. J. The difficulty that most presses us is, the insufficiency of the justification as to the entering the house.] The plea is consistent with the entire absence of suspicion on the defendant's part, that the plaintiff was in the house at the time of the trespass. (a)

*Channell*, Serjt., prayed leave to amend.

TINDAL, C. J. I cannot help thinking that the plea is bad, on the ground that it does not sufficiently shew the purpose for which the house was entered. That purpose may have been either to search for the stolen property, or to arrest the plaintiff: that is a matter which ought not to have been left in doubt.

Let the defendant amend within a week, on payment of costs; otherwise, judgment for the plaintiff.

Rule accordingly.

(a) *Sed vide supra*, 147.



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ANN GUYARD *v.* SUTTON.

May 27.

**A**SSUMPSIT on a promissory note made by the defendant on the 3rd of *March*, 1836, whereby he promised to pay the plaintiff 100*l.*, value received, on demand; with a count for money found due upon an account stated; and a general breach.

The defendant pleaded, amongst other pleas, as follows:—“ And for a further plea as to the first count of the declaration, the defendant says, that, at the time of making the said promissory note in the said first count of the declaration mentioned, the plaintiff was the wife of one *John Francis Guyard*; and that the only consideration for the making of the said promissory note, or for the payment of the amount thereof, was, the loan of 100*l.*, the money of the said *J. F. Guyard*, which was advanced by the plaintiff to the defendant without his authority and against his will; and the defendant says that the plaintiff took and received the said note, and always held and *still holds* the same without the authority and against the will of the said *J. F. Guyard*; and that the plaintiff never had, nor has she, any property in or right to the said note, or to receive payment of the amount thereof, or any part thereof; and that there never was any other value or consideration for the making of the said note, or for the payment by the defendant of the amount thereof, or of any part thereof—  
verification.

Special demurrer, assigning for causes, that the plea, by its commencement and conclusion, purported to be a plea in bar; whereas it disclosed matter pleadable only in abatement, and not in bar—that the plea should

To a count against the maker of a promissory note, he pleaded, *in bar*, that, at the time of making the note, the plaintiff was the wife of *A.*, that the consideration for the note was the loan of money of *A.* advanced by the plaintiff to the defendant without *A.*'s authority and against his will, that the plaintiff took the note, and held and *still holds* the same without the authority and against the will of *A.*, and that he never had any property in or right to the note:—

Held, an informal plea of coverture.



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not merely have stated that the plaintiff took and received the note, and always held, and still holds the same without the authority and against the will of the said *J. F. Guyard*, but should further have stated that *J. F. Guyard* had revoked or disaffirmed her right to hold and sue for the same, or should have shewn that the amount of the note had been satisfied to *J. F. Guyard*, or that *J. F. Guyard* had discharged the defendant from payment of, or ordered him not to pay the same to the plaintiff—that it should have alleged and shewn in more positive terms that the plaintiff had no interest or property whatever, nor any right, in equity or otherwise, to the money therein alleged to have been lent to the defendant, the mere allegation that the money was the money of the said *J. F. Guyard*, not being sufficient—that it was not averred in the plea that *J. F. Guyard* was alive at the commencement of the suit, and, for any thing that appeared therein, the property in the said note might have survived to the plaintiff after the death of *J. F. Guyard*—that the averment that the plaintiff still holds the note without the authority, and against the will of *J. F. Guyard*, was an attempt to make it appear from inference that the said *J. F. Guyard* was alive at the commencement of the suit—and that the plea was double, and in other respects uncertain, informal, and insufficient.

The defendant joined in demurrer.

*Channell*, Serjt., in support of the demurrer. The plea is bad on two grounds—first, it does not shew with sufficient distinctness that the husband of the plaintiff was living at the time of the commencement of the suit, so as to afford an answer to an action by the wife upon a contract made with her—secondly, it is an informal plea of coverture. In *Gaters v. Madeley* (a), it

(a) 6 *M. & W.* 423.



was held that the interest in a promissory note given to a wife during coverture, the consideration for which was money advanced by her during the coverture, survives to the wife after the death of her husband, unless he reduces it into possession in his lifetime. Reliance will probably be placed, on the other side, upon the fact that this money is alleged to have been the property of the husband: but the observations of *Parke, B.*, in *Gaters v. Madeley*, shew that that affords no distinction. "When," says the learned baron, "a chose in action, such as a bond or note, is given to a feme covert, the husband may elect to let his wife have the benefit of it, or, if he thinks proper, he may take it himself: and if, in this case, the husband had in his lifetime brought an action upon this note in his own name, that would have amounted to an election to take it himself, and to an expression of dissent on his part to his wife's having any interest in it. On the other hand, he may, if he pleases, leave it as it is; and, in that case, the remedy on it survives to the wife; or he may, according to the decision in *Philliskirk v. Pluckwell (a)*, adopt another course, and join her name with his own; and, in that case, if he should die after judgment, the wife would be entitled to the benefit of the note, as the judgment would survive to her." The only words here that give any colour for supposing the husband to be still living are these:—"and the defendant further says that the plaintiff took and received the said note, and always held and still holds the same without the authority and against the will of the said *J. F. Guyard*." [*Coltman, J.* It can hardly be intended that the plaintiff "still holds" the note against the will of her husband, unless he is living.] It ought to have been more distinctly averred. At all events, the plea is informal. Coverture is pleadable

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(a) 2 M. & Sel. 393.



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only in abatement. Or, if it is to be treated as a plea in bar, it contains two distinct averments, either of which would be an answer to the action. And the plea is not the less obnoxious to the charge of duplicity, because one of the grounds of defence is somewhat loosely pleaded.

*Talfourd*, Serjt. (with whom was *Ogle*), *contra*. The plea clearly is not double: the whole together amounts to but one defence, viz. that the plaintiff has no right to sue upon this note. [*Tindal*, C. J. Is not this substantially a plea in abatement only? *Cresswell*, J. If you can make out that the wife could not sue at all upon this note, either with or without her husband, then the plea may be a plea in bar; otherwise it is a plea in abatement, and bad in form. In *Bendix v. Wakeman* (a), it was held that the coverture of the plaintiff cannot be pleaded *in bar* to an action of covenant on a deed made between the defendant and the plaintiff during her coverture; it is matter for a plea in abatement only. And *Parke*, B., says: "The effect of the authorities seems to be, that *primâ facie* the right of action on this covenant belongs to the wife, and would survive to her on the death of the husband without his having reduced it into possession. If the plea had gone on to shew that the husband had dissented from her right in some operative way, as, by taking a new security, so as to vest the interest in himself, it might have been a good plea in bar, but it certainly is not so as it stands." The cases of *M'Neilage v. Holloway* (b), *Mason v. Morgan* (c), and *Calland v. Lloyd* (d), shew that this was a demand for which the husband alone ought to have sued, and therefore the plea is a good plea in bar.

(a) 12 *M. & W.* 97.  
 (b) 1 *B. & Ald.* 218.

(c) 2 *Ad. & E.* 30.  
 (d) 6 *M. & W.* 26.



[*Cresswell*, J. The note having been given to the wife in her own name only, might not the husband and wife have joined?] Possibly they might.

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*Channell*, Serjt., in reply, was stopped by the court.

TINDAL, C. J. It appears to me, that, as the matter alleged in this plea was pleadable in abatement, and in abatement only, the plea is bad in point of form. If the husband had died, the wife might, for any thing that I see, have sued upon the note; and, if that be so, the plea is clearly no more than a plea in abatement. *Bendix v. Wakeman* decides this case. That, it is true, was the case of a deed: but the principle is the same.

The rest of the court concurred.

Judgment for the plaintiff.

### MARLANNE TURNER v. BROWNE.

May 27.

**D**EBT, for money had and received, for interest, and for money found due upon an account stated.

In debt for money had and received, &c., the defendant

Plea, that, after the accruing of the said several debts

pleaded, that, after the accruing of the debts and causes of action, the defendant executed a deed, securing to the plaintiff a certain annuity, and that the plaintiff then accepted and received the same of and from the defendant in full satisfaction and discharge of all the said several debts and causes of action.

The plaintiff replied, that no memorial of the annuity deed was inrolled pursuant to the statute; that, the annuity being in arrear, the plaintiff brought an action to recover the amount of the arrears; that the defendant pleaded in bar of that action the non-inrolment of the memorial; and that thereupon the plaintiff elected and agreed that the indenture should be null and void, as pleaded by the defendant, and discontinued the action: —

Held, a good answer to the plea, inasmuch as it shewed that the accord and satisfaction thereby set up had been rendered nugatory and unavailing by the act of the defendant himself.



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and causes of action in the declaration mentioned, and before the commencement of the suit, to wit, on the 29th of *September*, 1841, he the defendant sealed with his seal in that behalf, and then as his act and deed delivered, a certain indenture in writing, bearing date, to wit, the day and year last aforesaid, and made between the defendant of the first part, the plaintiff of the second part, and one *Weston* of the third part (profert excused), and thereby — after reciting, amongst other things, that the defendant had contracted with the plaintiff for the absolute sale to her of one annuity or clear yearly sum of 308*l.*, to be paid to the plaintiff, her executors, administrators, and assigns, during the life of the defendant, in manner and form as therein was mentioned — he the defendant did give, grant, and confirm unto the plaintiff, her executors, administrators, and assigns, one annuity or clear yearly sum of 308*l.*, to be yearly issuing, payable, had, received, and taken by the plaintiff upon certain lands therein more particularly mentioned, and which said writing obligatory the defendant then delivered to the plaintiff, and the plaintiff then accepted and received the same of and from the defendant, in full satisfaction and discharge of all the said several debts and causes of action in the declaration mentioned, and of all damages by the plaintiff sustained by reason of the detention thereof — verification.

Replication, that the indenture in the plea mentioned was made and entered into by and between the defendant and the plaintiff and *Weston* after the passing of the 53 G. 3. c. 141., intituled “An act to repeal an act of the seventeenth year of His present Majesty, intituled ‘An act for registering the grants of life annuities, and for the better protection of infants against such grants,’ and to substitute other provisions in lieu thereof,” and that the said annuity in the indenture



mentioned was granted by the defendant to the plaintiff upon and for a pecuniary consideration in that behalf, and that the said indenture was made and entered into by and between the defendant and the plaintiff and *Weston* for the said pecuniary consideration by the plaintiff so given and paid to the defendant in that behalf as aforesaid, and that no memorial of the said indenture was inrolled in the high court of Chancery within thirty days after the execution thereof, according to the directions of the said statute; that, afterwards, and after the expiration of thirty days after the execution of the indenture, and before the commencement of the suit, to wit, on the 29th of *March*, 1844, a large sum of money, to wit, 770*l.* of the said annuity or yearly sum, for two years and a half of another year, next following the date of the said indenture, and which immediately preceded and ended on the said 29th day of the said month of *March*, became due and payable from the defendant to the plaintiff, and payment thereof was afterwards, to wit, on &c., demanded by the plaintiff of the defendant, who then wholly neglected and refused to pay the same; that the said sum of money being so owing and in arrear as aforesaid, she the plaintiff, for the recovery of the same, did afterwards, to wit, on &c., sue and prosecute out of the court of Queen's Bench at *Westminster*, a certain writ of our Lady the Queen called a writ of summons, bearing date &c., directed to the defendant, whereby the defendant was commanded, &c., and that such writ was so sued out and prosecuted as aforesaid out of the said court by the plaintiff, with intent that the defendant might, by virtue thereof, appear in the said court to answer her in the said action, and that the plaintiff might thereupon declare against him the defendant upon and for the said sum of money so due and owing from the defendant to the plaintiff as aforesaid; that the defendant afterwards,

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to wit, on the day and year last aforesaid, appeared in the said court to answer the plaintiff in the said action, and thereupon the plaintiff according to the said intent, did afterwards, and before the commencement of the suit, to wit, on &c., declare, amongst other things, in the said action — that whereas, theretofore, to wit, on the 29th of *September*, 1841, by a certain indenture then made between the defendant of the first part, the plaintiff of the second part, and the said *T. E. Weston* of the third part (profert), he the defendant did covenant with the plaintiff that he the defendant should and would well and truly pay or cause to be paid unto the plaintiff, during his, the plaintiff's natural life, a certain annuity or yearly sum of 308*l.*, free from all taxes, and without any deduction whatsoever, at the days and times and in manner and form as in the said indenture expressed and appointed for payment thereof, that is to say, &c., &c., the first payment of the said annuity to begin and be made on the 29th of *December* next ensuing the date of the said indenture, according to the true intent and meaning of the said indenture; as by the said indenture, reference being thereunto had, would, amongst other things, more fully and at large appear; and the plaintiff in fact further said, that, after the making of the said indenture, and before the commencement of that suit, to wit, on the 29th of *March*, 1844, a large sum of money, to wit, the sum of 770*l.*, of the said annuity or yearly sum, for two years and the half of another year, next following the date of the said indenture, and which immediately preceded and ended on the day and year therein last aforesaid, became due from the defendant to the plaintiff, and still remained in arrear, contrary to the said indenture and the said covenant of the defendant in that behalf; that the defendant thereupon, afterwards, and before the commencement of this suit, to wit, on &c., did, amongst other things, plead



to the said declaration in the manner following, that is to say, that the indenture in the declaration mentioned, was made and entered into after the passing of the 53 G. 3. c. 141., intituled &c., and that the said annuity was granted upon and for a pecuniary consideration in that behalf; and the defendant further said that no memorial of the indenture in that declaration mentioned was inrolled in the high court of Chancery within thirty days after the execution thereof, according to the directions of the said act of parliament, and that this be the defendant was ready to verify: that the indenture in the said plea of the defendant and in the said declaration of the plaintiff mentioned, was one and the same indenture, and that the same was void, a memorial thereof not having been inrolled pursuant to the provisions of the said statute: that the plaintiff, afterwards, and after the pleading of the said pleas in the said action of debt as thereinbefore mentioned, and before the commencement of this suit, to wit, on the 29th of November, 1844, *elected and then consented and agreed, solely in consequence of the said plea so pleaded by the defendant and stating the said indenture to be null and void as aforesaid, that the said indenture should be null and void, as pleaded by the defendant; that thereupon she, the plaintiff, afterwards, to wit, on the day and year last aforesaid, and before the commencement of this suit, entered a discontinuance of the said action of debt, and the same was thereby then abated, and ceased, and was and is thereby wholly determined and ended; and that the said sum of 770*l.*, and every part thereof, was and still is wholly unpaid and unsatisfied by the defendant to the plaintiff—verification.*

Demurrer to this plea, assigning for causes, amongst others, that the replication was no answer to the plea, inasmuch as it was alleged in the plea that the defendant gave and the plaintiff accepted the indenture in full

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satisfaction and discharge of the causes of action to which the plea was pleaded, which facts the plaintiff admitted by the replication; and, such being the case, the plaintiff must be taken to have accepted such indenture for better and for worse, and therefore could not undo an accord and satisfaction, which had thus been completely carried into effect, by shewing matter *ex post facto* by which the indenture was supposed to have been rendered useless and void, to wit, the election of the defendant to render the indenture void for the reasons mentioned in the replication — that the replication, shewing facts by which the indenture was supposed to become useless, was nothing more than an argumentative traverse that such indenture was given and accepted in accord and satisfaction as mentioned in the plea, or else was a mere allegation that the thing given in accord and satisfaction was of no value; a ground which the plaintiff might have taken by simply traversing the accord and satisfaction — that the replication should have concluded to the country, and not with a verification — that it was a departure from the ground taken by the plaintiff in her declaration, inasmuch as if the indenture was given and accepted in accord and satisfaction, as set forth in the plea, the plaintiff should have declared upon a new cause of action then furnished to her — that the replication was bad for pleading matters of evidence, inasmuch as if the plaintiff meant to rest her case upon the indenture therein mentioned becoming void, she should simply have said so, and not set forth in the replication the proceedings in the former action between the plaintiff and the defendant, and the discontinuance of such former action by the plaintiff, all which facts were merely matters of evidence, the setting forth of which at length on the record tended to prolixity and the useless multiplication of issues, and was contrary to the rules of pleading — that the replication was



double, inasmuch as, after setting forth the said facts and matters of evidence, which in themselves would be sufficient, as the plaintiff contended, to render null and void the said indenture, the plaintiff proceeded to assert, that, after the pleading of the said pleas in the former action, the defendant elected and agreed that the said indenture should be null and void, such assertion being idle, double, and unnecessary, in conjunction with the former part of the replication — that no facts were stated in the replication shewing an election or agreement on the part of the defendant that the indenture should be null and void; inasmuch as it appeared by the plaintiff's own shewing, that, in the former action between the plaintiff and the defendant, the defendant, in addition to the said plea in the former action set out in the replication, to wit, that the annuity was void for want of inrolment according to the statute, pleaded along with such last-mentioned plea divers other pleas to the said former action; and it was consistent with the replication that the plaintiff might have discontinued such former action, because she could furnish no answer to the said other pleas which the defendant pleaded therein, and though she now chose to allege that such plea of want of inrolment of the annuity was the sole cause and motive for her discontinuing the said action, yet the defendant could not take issue upon such a circumstance as the plaintiff's motives — that the replication should have shewn some notification to the defendant, on the part of the plaintiff, that the plaintiff accepted such offer of holding the annuity void, if, as the plaintiff contended, pleading the said plea of non-inrolment amounted to such an offer, and there was nothing to shew, — inasmuch as it was not alleged in the replication, — that any acceptance on the part of the plaintiff to such offer of the defendant was made at any time before the commencement of this suit, or in fact that it was ever

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made at all; and it was consistent with the replication, that the defendant might have been bound to treat the said annuity as void, and not the plaintiff—and that it was not stated that the *plaintiff*, as well as the *defendant*, agreed that the said indenture should be null and void, &c.

The plaintiff joined in demurrer.

*Channell*, Serjt. (with whom was *J. Brown*), in support of the demurrer. Undoubtedly, under the circumstances stated in this replication, the consideration money paid for the annuity may be recovered back; but it did not become money had and received to the use of the plaintiff until the defendant elected to avoid the annuity: *Cowper v. Godmond* (a); *Churchill v. Bertrand* (b); *Huggins v. Coates*. (c) The defendant having pleaded that the plaintiff accepted and received the annuity deed in full satisfaction and discharge, the plaintiff might have directly traversed that: the replication, however, is an informal and argumentative denial of the alleged acceptance in satisfaction, setting up an entirely new cause of action. In *Sard v. Rhodes* (d), in assumpsit by the indorsee against the acceptor of a bill of exchange for 43*l.*, the defendant pleaded, that, after the bill became due, one *T. P.*, the drawer of the bill, made his promissory note for 44*l.*, and delivered the same to the plaintiff, in full satisfaction and discharge of the bill: the plaintiff replied, that, although the plaintiff accepted the note in full satisfaction of the bill, yet that the note was not paid when due, and still remained unpaid: and it was held that the replication was bad, and that the plaintiff, having accepted the note in full satisfaction and discharge of the bill, could not sue

(a) 9 *Bingh.* 748., 3 *M. & Scott*, 219.

(b) 2 *Gale & D.* 548.

(c) 5 *Q. B.* 432.

(d) 1 *M. & W.* 153., *Tyrwh.* & *Gr.* 298., 4 *Dowl. P. C.* 743.



upon the latter; and that the plea was sufficient. [*Cresswell*, J. There, the substituted security remained available in the hands of the plaintiff.]

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*Talfourd*, Serjt. (with whom was *Ogle*), *contra*. The replication does not deny the existence or the receipt of the annuity deed, but alleges that it was subject to a condition imposed by the statute, which was not performed, and that the defendant himself elected to avoid the deed, and so she, the plaintiff, was remitted to her original right. The authorities shew that the grantee cannot recover back the consideration money, on the ground of non-inrolment, or the inrolment of a defective memorial, until some act done by the grantor to intimate his intention to avoid the grant: *Scurfield v. Gowland* (a); *Waters v. Mansell* (b); *Davis v. Bryan*. (c) [*Cresswell*, J. The grantee cannot say the consideration has failed, so long as he receives the annuity. *Tindal*, C. J. I think the plaintiff might safely have traversed the plea: I do not see how the defendant, having by his own act elected to avoid the grant, can be permitted to set it up as an accord and satisfaction.]

*Channell*, Serjt., was heard in reply.

TINDAL, C. J. Upon the best consideration I am able to give to this case, I think the plea cannot be sustained (d): it shews no real satisfaction. And the replication shews that the deed which was delivered to the plaintiff in satisfaction, by the act or default of the defendant, became wholly inoperative and void. I think the defendant has no right to set up as an accord, a

(a) 6 *East*, 241.

(b) 3 *Taunt.* 56.

(c) 6 *B. & C.* 651., 9 *D. & R.* 726.

(d) The plea would appear

to be good until met by a general traverse, or by a special replication shewing the nullity of the alleged satisfaction.



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 — I therefore think the replication good, and consequently  
**TURNER** that the plaintiff must have judgment.  
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**COLTMAN, J.** I think also that the plaintiff has properly shewn by his replication that that which professed to be a satisfaction, was, in truth, no satisfaction at all.

**CRESSWELL, J.,** concurred.

Judgment for the plaintiff.

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In the Matter of **JANE TURNER.**

*May 28.*

Upon a motion on the part of a married woman, under the 3 & 4 *W. 4. c. 74. s. 91.*, to convey her interest in property without the concurrence of her husband, on the ground that he is of unsound mind, the affidavit must shew in distinct terms, or by necessary inference, that the husband is lunatic at the time of the application.

**CHANNELL, Serjt.,** on a former day in this term, obtained an order, under the ninety-first section of the 3 & 4 *W. 4. c. 74.*, to dispense with the concurrence of the husband of *Jane Turner* in a conveyance for the extinguishment of her right to dower in a certain estate, the husband being a lunatic. The application was founded upon the affidavit of the wife, which stated that the deponent was married to *John Turner*, at &c., on the 22nd of *June*, 1819; that a commission of lunacy was, in or about the month of *January*, 1841, issued by the Lord High Chancellor of *Great Britain* against the said *John Turner*, under which he had been duly found a lunatic; that *Charles Challen*, of &c., had been appointed the committee of his estate; that, by an order made, in the matter of the said *John Turner*, by the Chancellor, bearing date the 28th of *March*, 1846, his lordship did order, that, for the purpose of raising a fund for the discharge of the debts, incumbrances, and costs then due and owing from the said lunatic and his estate, the estate of the said lunatic, situate at *Elestham*,



in the county of *Southampton*, should be, under the provisions of the 11 G. 4. & 1 W. 4. c. 65., “for consolidating and amending the laws relating to property belonging to infants, — *femes covert*, idiots, lunatics, and persons of unsound mind,” sold to Lord *Calthorpe*, at the price approved of by the master, and upon the terms specified in the agreement therein mentioned; and, upon payment of the sum of 3500*l.*, the purchase-money for the said estate, his lordship did further order that the said *Charles Challen*, as such committee as aforesaid, should, in the place of the said lunatic, execute such deed or deeds as should be necessary for conveying the said estate at *Elvetham* to Lord *Calthorpe*, his heirs and assigns, or as he or they should direct, such deed or deeds to be settled and approved of by the master in lunacy, in case the parties differed about the same; that, on the occasion of her marriage with the said *John Turner*, no settlement, or agreement for a settlement, was made upon her, nor any jointure in lieu of dower; and that her right to dower still existed in the said estate at *Elvetham*, and the deponent was desirous of extinguishing such right, so that the conveyance of the said estate at *Elvetham* to Lord *Calthorpe* might be made free therefrom.

The clerk of the rules having suggested a doubt whether the above affidavit sufficiently shewed that the husband was *still* a lunatic, the learned serjeant now renewed his motion.

*Per curiam.* We think the necessary inference from the facts stated in the affidavit, is, that the husband is still a lunatic; and therefore the rule may go.

Fiat.

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## BOYDELL and Another v. HARKNESS.

*May 28.*

In a count by an indorsee against the drawer of a bill drawn payable in *London*, the venue being laid in *London*, a general allegation of presentment was held to be a sufficient allegation of a presentment in *London* since the rule of *Hilary* term, 4 *W.* 4. r. 8.

*Quære* whether the defect would have been aided by the defendant's pleading over, if the venue had been laid elsewhere.

**T**HIS was an action of assumpsit by indorsees against an indorser of a bill of exchange. The declaration stated that one *Simpson*, on &c., made his bill of exchange in writing, bearing date &c., and directed the same to one *Pauleston*, and thereby required *Pauleston* to pay to the order of him, *Simpson*, in *London*, the sum of 198*l.*; that *Simpson* then indorsed the said bill to the defendant, who then indorsed the same to one *Raynes*, who then indorsed the same to the plaintiffs; and that *Pauleston* did not pay the said bill, *although the same was presented to him for payment on the day when it became due*, whereof the defendant then had due notice.

The indorsements and the notice of dishonour were respectively traversed, but there was no traverse of the presentment.

The cause was tried before *Maule*, J., at the second sitting in *London* in the last term. It appeared that the bill became due on *Wednesday*, the 18th of *March*, and that the defendant received notice of its dishonour on the 20th, at *Liverpool*. There was no evidence given on the part of the plaintiff to account for the intermediate day, nor any evidence of the course of post between *London* and *Liverpool*: but it was objected, on the part of the defendant, that the notice was out of time. A verdict having been found for the plaintiff,

*Byles*, Serjt., in *Easter* term, moved for a new trial, on the ground that, upon the above state of facts, the learned judge ought to have directed the jury to find



the issue on the want of notice, for the defendant. He submitted that the plaintiff ought to have given some evidence to account for the notice not reaching the defendant on the 19th, which, according to the ordinary course of the post, it would have done, if sent in time, or to shew that the bill was in the hands of a banker or of some third person, so as to justify the delay. [*Tindal*, C.J. Judicially, we know nothing of the course of the post. If the defendant wished to avail himself of the supposed delay, he should have given some evidence of it. Upon this point, therefore, there will be no rule.]

The learned serjeant then moved to arrest the judgment, on the ground that the declaration contained no sufficient averment of a presentment for payment *in London*. He cited *Gibb v. Mather* (a), and *Lyon v. Holt* (b).

A rule nisi having been granted,

*Dowling*, Serjt. (with whom was *Barstow*), shewed cause. The allegation might possibly be an insufficient allegation of presentment to the drawee *in London*, if objected to on special demurrer; but, after verdict, it is well enough. [*Cresswell*, J. The verdict does not help you. It is only upon the supposition that the fact must have been proved at the trial, or the judge would have directed the jury to find the other way, that any aid is derived from the verdict. *Maule*, J. It is not alleged that the bill was *duly* presented.] *London* being the only place mentioned, it must be assumed that the presentment took place there. The count is in the form given in the schedule to the rule of *Trinity* term, 1 W. 4. [*Maule*, J. The words "then and there" are omitted, in the averment of presentment.] In this respect, the pleader has properly complied with the

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(a) 8 Bingham 214., 1 M. & Scott, 387.

(b) 5 M. & W. 250., 2 Horn & Hurlstone, 41.



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direction in R. H. 4 W. 4. that "the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and *no venue shall be stated in the body of the declaration*, or in any subsequent pleading." (a) It must now be assumed that the plaintiff proved at the trial all that was necessary to support this allegation. (b) In *Parks v. Edge* (c), it was held, that, in a declaration by an indorsee of a bill against an indorser, it is not necessary to allege a special acceptance to pay at a particular place, or a presentment at such place: it is sufficient to state a general presentment to the drawee, without stating any acceptance, and to prove the presentment at the particular place pointed out by the acceptance. The declaration there was precisely in the form here adopted; and *Bayley, B.*, said: "As to the objection that it was incumbent on the plaintiff to allege in his declaration a presentment at the particular place, No. 8. *Cloak Lane* — the plaintiff is bound to prove a presentment, but the manner and place of presentment are matter of evidence. It is not necessary to state an acceptance, whether general or at a particular place, against any party, except the acceptor; and, therefore, a plaintiff who declares without stating an acceptance by the drawee, cannot be bound to state on the record such a presentment as the real acceptance requires. It is merely matter of evidence; and the proof of the presentment at the particular place pointed out by the drawee, is evidence of the general presentment alleged in the declaration." [*Maule, J.* The necessity of a distinct allegation of presentment in *London*, if any exists,

(a) Sect. 8. "Provided that, in cases where local description is now required, such local description shall be given."

Had the venue been in *Mid-dlesex* there must have been an allegation of presentment in

*London*. The allegation is, therefore, not matter of venue.

(b) It was not in issue.

(c) 1 C. & M. 429. There, the bill was accepted "payable at 8 *Cloak Lane, Cheapside*."



arises here from the fact of there being a direction in the bill on the part of the drawer to pay the bill there. If the drawer directs the drawee to pay the bill at a particular place, the liability of the drawer and indorsers arises only on the drawee's failure to pay upon the bill being presented to him at the place indicated. Unless the construction first contended for is correct, a presentment at *Paris* would sustain this allegation.] In *Lyon v. Holt* (a), *Parke, B.*, intimates an opinion that, after verdict, presentment to the acceptor would be taken to mean presentment according to the tenor and effect of the bill.

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*Byles, Serjt.*, in support of his rule. Three questions will arise here — first, whether this declaration would have been sufficient before the statute 1 & 2 G. 4. c. 78. — secondly, whether that statute makes any difference in this respect — thirdly, whether the infirmity of the declaration is aided by the verdict. The case of *Rowe v. Young* (b), which occasioned the passing of the 1 & 2 G. 4. c. 78., is a distinct authority to shew that the general allegation of presentment here would have been held bad. [*Maule, J.* The statute can have no application to this case. Where the drawee is required to pay the bill at a particular place, by accepting generally, he engages to pay at the time and place required.] *Saunderson v. Bowes* (c) and *Gibb v. Mather* (d) are also authorities to shew that a presentment at the place indicated by the drawer must be averred and proved. The cases cited are not by any means inconsistent with this argument. Then, is the defect cured by the verdict? [*Maule, J.* It is not the *verdict* that aids; it is the *pleading over*. If the language of the declaration

(a) 5 M. &amp; W. 250.

(a) 14 East, 500.

(b) 2 B. &amp; B. 165., 2 Bligh, 391.

(d) 8 Bingh. 214., 1 M. &amp; Scott, 387.



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is ambiguous, and the defendant pleads over, it must, if capable of such a construction, be taken in a sense that will require an answer: *Hobson v. Middleton*. (a) ] That rule only holds as to that part of the declaration to which the pleading over applies. The *dictum* of *Bayley, J.*, in *Hobson v. Middleton*, appears to have been founded upon the case of *Avery v. Hoole* (b), which, however, does not quite warrant it. [*Maule, J.* The rule is very distinctly laid down both by *Holroyd, J.*, and *Bayley, J.*] In the notes to *Stennel v. Hogg* (c), it is thus stated: “Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer; yet, if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict, by the common law.” “But (d), where there was any defect, omission, or imperfection, though in form only, in some *collateral* parts of the pleading that were not in issue between the parties, so that there was no room to presume that the defect or omission was supplied by proof, a verdict did not cure them by the common law.” So, in *Bull’s* case (e), it is said, that, “if the avowry, or any count or replication, &c., wants form, or omits circumstance of time, place, &c., then the plea of the other party may mend such imperfections, but cannot supply the defect of matter of substance.” And in *Dr. Bonham’s* case (g), it is said that “the difference is, when the plaintiff replies, and by his replication it appears that he has no cause of

(a) 6 B. & C. 302., 9 D. & R. 249.

(b) *Cowp.* 825.

(c) 1 *Wms. Saund.* 228.

(d) *Ib.* 228. a.

(e) 7 *Co. Rep.* 25. a.

(g) 8 *Co. Rep.* 120. b.



action, there he shall never have judgment: but, when the bar is insufficient in matter, or amounts (as the case is) to a confession of the point of the action, and the plaintiff replies, and shews the truth of the matter to enforce his case, and in judgment of law it is not material, yet the plaintiff shall have judgment, for, it is true that sometimes the declaration shall be made good by the bar, and sometimes the bar by the replication, and sometimes the replication by the rejoinder, &c.; but the difference is, when the declaration wants time, place, or other circumstance, it may be made good by the bar; so of the bar, replication, &c., as appears in 18 E. 4, 16. *b.* (a) But, when the declaration wants substance, no bar can make it good; so of the bar, replication, &c.; and therewith agrees 6 E. 4, 2. (b), a good case." [Maule, J. It is quite true, that an omission of matter of substance, is not cured by pleading over.] In *Chitty on Pleading* (c), the rule is thus stated: "A defect in pleading is aided, if the adverse party *plead over* to, or answer, the defective pleading in such a manner that an omission or informality therein is *expressly* or *impliedly* supplied or rendered formal or intelligible. (d) The following are a few instances of *express* aider. In an action of debt on a bond, where the declaration specified no place in which the bond was made, it was held that a plea of duress '*apud B.*' supplied the omission in the declaration; as such a plea contained a distinct admission that the bond was made at the place where the alleged duress was. (e) In an action for

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(a) M. 18 E. 4, fo. 16, pl. 19.

(b) M. 6 E. 4, fo. 2, pl. 4.

(c) 7th edit. p. 703.

(d) Citing *Com. Dig. Pleader*, C. 85., E. 37.; *Co. Litt.* 303. b.; *Fowle v. Welsh*, 1 B. & C. 29., 2 D. & R. 138.; *Fletcher v. Popen*, 3 B. & C. 192., 5 D. & R. 1.; *Stephen on Plead-*

*ing*, 5th edit. 160.; *Banks v. Angell*, 7 Ad. & E. 843., 3 N. & P. 94.; *France v. White*, 1 M. & G. 731., 1 Scott, N. R. 604.

(e) *Dyer*, 15. a.; *Com. Dig. Pleader*, C. 85.; *Parslow v. Baily*, 2 Ld. Raym. 1039.; *Mellor v. Barber*, 3 T. R. 387.



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slander, where the declaration averred that the plaintiff was *forsworn*, without shewing how, it was determined that this defect was aided by a plea of justification, which alleged that the plaintiff, who was stated in the declaration to be a constable, had taken *a false oath at the sessions*. (a) And, again, in an action of trespass for taking a book, where the plaintiff omitted to state that it was *his* book, or that it was in his *possession*; and the defendant, in his plea, justified the taking the book *out of the plaintiff's hand*; the court held, on motion in arrest of judgment, that the omission in the declaration was supplied by the plea." (b) [*Maule, J.* The *total* omission of an allegation of the presentment of the bill, would not be cured by pleading over.] The presentment should have been alleged to have been made *in London*: the allegation, as it stands, is not an equivocal or a defective statement that may be aided by pleading over. [*Maule, J.* I do not think the rule, as to the effect of pleading over, comes in question here: that doctrine arose long before any distinction was made between general and special demurrer.] The objection is not removed by the rule of *Hilary* term, 4 *W. 4.* [*Cresswell, J.* Suppose the presentment had been alleged to have been made "there, to wit, *in London*," would that have sufficed?] Perhaps it would. [*Cresswell, J.* If so, the introduction of the word "there" only, would have made the allegation unexceptionable, for it would have had reference to the venue in the margin.] The rule referred to was not intended to interfere with the general principles of pleading: when it is necessary to prove an act done at a particular time or place, the time and place must be distinctly averred. This declaration would clearly have been bad on general

(a) *Drake v. Corderoy, Cro. Car.* 288.; *Com. Dig. ut supra.*

(b) *Brooke v. Brooke, 1 Sid.* 184.; *Bac. Abr. Trespass*, 603.



demurrer: and the defendant is not to be placed in a worse position than if he had suffered judgment by default.

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TINDAL, C. J. It appears to me that this case is to be determined by a reference to the rule of *Hilary* term, 4 *W.* 4. By the operation of that rule, the allegation of presentment in this declaration must be read as if it had contained the words "then and there," which would have made it a distinct allegation that the bill was presented in *London*.

COLTMAN, J. It is unnecessary in this case to say any thing as to the effect of pleading over; because, the rule adverted to having prohibited the statement of a venue in the body of the declaration, we must read this declaration as if each fact therein had been alleged to have taken place in *London*.

MAULE, J. The rule provides that the venue shall be in the margin of the declaration, and shall not be stated in the body thereof, or in any subsequent pleading. What is the venue? It is the place where all the matters alleged in the declaration are supposed to have taken place. That being so, the rule of *Hilary* term, 4 *W.* 4., requires the place where all the matters of fact occurred, to be stated in the margin of the declaration, and there only. The county in the margin of the declaration, therefore, is to be assumed to be the county where the plaintiff is to be understood to allege all the matters of fact to have taken place. The venue here being *London*, all the matters of fact alleged in the declaration must be assumed to have taken place in *London*. If material, and traversed, the plaintiff must prove them to have taken place in *London*: if not traversed, the fact of their having taken place in *London*



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CRESSWELL, J. Before the rule in question, every allegation upon which issue could be taken, that is, every material and traversable allegation (supposing it to be in the affirmative form) was required to be laid with a venue, that is, the place at which the alleged fact happened. (a) Accordingly, in a case like this, the declaration would have alleged that the presentment of the bill took place in *London*, that being the place where the venue is laid. Now, however, the venue in the margin having been found sufficient for all practical purposes, none other is to be stated. We must, therefore, read the declaration as if the venue in the margin had been repeated; and then the allegation will be, of a presentment of the bill in *London*.

Rule discharged.

(a) *Stephen on Pleading*, 3rd edit. p. 281., 5th ed. p.

### DOE dem. GAISFORD and Others v. STONE

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A., by a deed, in which it was recited that he was seised in fee, mortgaged to B. in fee. Indorsed on this deed was a memorandum, signed by C. — “that, by an indenture of surcharge, bearing date, &c., the within premises were charged by me, *the purchaser of the equity of redemption thereof*, with the payment of the further sum of 325*l.* and interest:”—

Held, that this amounted to an admission by C. that he came in under A., and that he was therefore bound by the recital that bound A.



demises: — the first, by *William Gaisford*; the second, by *William Colmar*; and the third, by *Benjamin Colmar*.

The cause was tried before *Erle, J.*, at last spring assizes at *Taunton*. On the part of the lessor of the plaintiff, a deed was put in, bearing date in *August, 1828*, whereby one *Sanders*, who was assumed to be seised in fee of the whole thirty-two acres, mortgaged sixteen acres to one *Protheroe* for a term of 1000 years. It was then proposed to put in a deed purporting to be an assignment of this term by *Protheroe* to *Gaisford*; but, being insufficiently stamped, this deed was rejected.

The plaintiff then put in an indenture of the 21st of *May, 1829*, by which *Sanders* conveyed the whole thirty-two acres to *William Colmar*, by way of mortgage in fee: the effect of this deed being, to make *William Colmar* first mortgagee in fee of sixteen acres, and second mortgagee in fee of the other sixteen acres. The deed contained a recital that *Sanders* was seised in fee in possession. Indorsed on this deed was the following memorandum, dated the 12th of *May, 1832*, and signed by the defendant: —

“Memorandum, that, by an indenture of surcharge, bearing date the 5th day of *May* instant, the within premises were charged by me *William Stone*, the purchaser of the equity of redemption thereof, with the payment of the further sum of 325*l.* and interest from the said 5th day of *May*.”

The indenture referred to in this memorandum was not produced. But it was contended, that, as *Sanders* would be bound by the recital in the deed of the 21st of *May, 1829*, the defendant was equally bound, by virtue of the indorsement thereon, which shewed him in possession of the equity of redemption under *Sanders*; and so the objection arising from the 1000 years term appearing to be outstanding in *Protheroe*, was removed.

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The learned judge being of this opinion, a verdict was taken for the lessor of the plaintiff, on the second demise, leave being reserved to the defendant to move to enter a verdict for him, if the court should be of opinion that the jury ought to have been told to limit the verdict to sixteen acres.

*Channell*, Serjt., in *Easter* term last, accordingly obtained a rule nisi. He referred to *Slatterie v. Pooley* (a), *Howard v. Smith* (b), *Lord Trimleston v. Kemmis* (c), and *Carpenter v. Buller* (d).

*Manning*, Serjt. (with whom was *F. Bailey*), now shewed cause. It is conceded that *Sanders* is bound by the recital contained in the deed of the 21st of *May*, 1829, by which he covenants and declares, that, at the time of executing that deed, he was possessed of the fee in the entire thirty-two acres, and that the incumbrance by *Protheroe* has in some way or other been destroyed. And the memorandum signed by the defendant is an admission or declaration by him that he is the purchaser of the equity of redemption of *Sanders*: *Slatterie v. Pooley*. A recital that binds *Sanders*, is equally binding upon one who is in privity with, or comes in under, him.

*Channell*, Serjt. (with whom was *Fitzherbert*), in support of the rule. *William Colmar* was party to the deed of the 21st of *May*, 1829, upon which the memorandum was indorsed; but he was no party to the memorandum; neither did the defendant come in under him. *William Colmar* not being estopped by the sup-

(a) 6 <i>M. &amp; W.</i> 664.	(c) 9 <i>Clark &amp; F.</i> 784.
(b) 3 <i>M. &amp; G.</i> 254., 3 <i>Scott</i> ,	(d) 8 <i>M. &amp; W.</i> 209.
<i>N. R.</i> 574.	



posed admission contained in that memorandum, it cannot operate by way of estoppel against the defendant, for want of mutuality. [*Maule, J.* It is not put on the ground of estoppel, but rather as an admission by one claiming under the mortgagor.] It may be, according to the case of *Slatterie v. Pooley*, that that which cannot operate as an estoppel, may bind the party as a declaration or admission. [*Maule, J.* It appears that the defendant comes in under *Sanders*, the mortgagor: can he be in a better situation than *Sanders*? The memorandum surely is evidence from which the jury might and ought to infer that the equity of redemption therein spoken of, is the equity of redemption of the premises referred to in the deed upon which it is indorsed.] If the memorandum does not operate by way of estoppel, it cannot be received as a declaration or admission, because the deed of the 5th of *May*, 1832, which is referred to and might have explained it, was not put in.

**TINDAL, C. J.** This case turns upon the legal effect of the indenture of mortgage of the 21st of *May*, 1829, and of the memorandum thereon indorsed, of the 12th of *May*, 1832. The indenture appears to be a mortgage in fee of the thirty-two acres by *Sanders* to *William Colmar*; and it contains a recital that *Sanders* was seized thereof in fee. After that recital, it would clearly not be competent to the mortgagor to set up, as against the mortgagee, any preceding estate which he himself had created. It is said, that the defendant, being no party to this deed, and there being no estoppel binding on *William Colmar*, there is none binding the defendant. This, however, is not exactly a case to which that doctrine applies: the memorandum operates, not by way of estoppel, but as a declaration or admission by the defendant that he has no better title than *Sanders*, of whose equity of redemption in the premises purport-

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ing to be conveyed by the deed, he states himself to be the purchaser. I think he could have no more right than *Sanders* had, to set up the title of *Protheroe* under the former mortgage, and, therefore, that the direction was correct.

COLTMAN, J. It appears to me also, that the memorandum in question amounts to an admission that the defendant came in under *Sanders*: and, if so, that brings it to the ordinary case of a tenant let in by a mortgagor, who, equally with the mortgagor, is estopped from setting up against the mortgagee a title created by a prior mortgage. I therefore think the verdict right.

MAULE, J. This is the common case of mortgagor and mortgagee. When the mortgagor is out of possession, and it can be shewn that the party who is in, came in under him, he is treated as being in privity with him, and is estopped from setting up a defence that would not be open to the mortgagor. The defence here, as to sixteen acres, was, the term outstanding in *Protheroe*. The recital in the deed of the 21st of *May*, 1829, that *Sanders*, the mortgagor, was seised in fee, was evidence against him that the former term had ceased: and the defendant stands in the shoes of *Sanders*, by his admission in the memorandum. I therefore think the learned judge properly abstained from telling the jury to limit their verdict to the other sixteen acres.

CRESWELL, J. I am of the same opinion. I think there was abundant evidence of title in *William Colmar* to the whole thirty-two acres. The memorandum shewing that the defendant came in under *William Colmar*, he had no more right to insist upon the prior mortgage to *Protheroe*, than *Sanders* could have had.

Rule discharged.



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## GIBBONS v. ALISON and CUMBERLEGE.

May 28.

**C**ASE, for maliciously, and without reasonable or probable cause, arresting the plaintiff on a *capias* obtained under a judge's order. Plea, not guilty.

The cause was tried before Lord *Denman*, C. J., at the last spring assizes for the county of *Surrey*. It appeared, that, in *May*, 1844, a negotiation was opened between the plaintiff, who was master and owner of a vessel called the *Belle*, and the defendants, merchants in *London*, for a shipment of guano on account of the latter. The contract was contained in the following correspondence: —

“ *London*, 28th *May*, 1844.

“ Messrs. *Cumberlege & Co.*

“Gentlemen,— With reference to the communication which I have had with you through Mr. *Arnold*, in respect to the shipment of a cargo of guano at *Valparaiso* on board my schooner *Belle*, of 170 tons, I beg to acquaint you that I am agreeable to have it shipped by your house on the conditions you expressed, that the price should not exceed 2*l.* 16*s.* per ton, put on board in the bay of *Valparaiso*, exclusive of bags and your commission; say, for a cargo of guano about 200 tons; leaving it with you to effect at less price if possible. I have only to add, that I have arranged with Mr. *Kirkman* to accept drafts for the amount on production of the bills of lading. . You will please to exchange a few lines confirming this agreement.

(Signed) “ *George Gibbons.*”

was a total want of reasonable and probable cause, and that the act was done with malice: — Held, a misdirection.

In case for maliciously, and without reasonable or probable cause, causing the plaintiff to be arrested on a *capias* under the statute 1 & 2 *Vict.* c. 110. s. 3., the order for which had been obtained upon an affidavit not fairly disclosing the nature of the contract, for the alleged breach of which the defendants were suing — the judge having stated, that, in his opinion, the plaintiff had failed to make out a want of reasonable and probable cause, told the jury, that, to entitle the plaintiff to a verdict, they must be satisfied that there defendants had



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the said guano to this country, and it therefore became necessary to dispose of the same at *Valparaiso* aforesaid; that the said cargo of guano was accordingly sold by public auction for the best price that could be procured for the same; that the loss on the sale of the said cargo of guano amounted to 358*l.* 11*s.* 10*d.*, whereby damage to that amount had accrued to deponent and his said partner; that the whole of the said sum of 358*l.* 11*s.* 10*d.* was then justly due and owing from *Gibbons* to deponent and his said partner; that the *Belle* was then lying in the port of *Liverpool*, and was loading outward for some port out of the jurisdiction of the court, viz. to some port in *North America*; that *Gibbons* purposed and intended to command the said vessel on her outward voyage, and had accordingly made the proper entry at the Custom House at *Liverpool* of such intention, and had duly advertised the said voyage in 'The Outward Shipping List' (a printed copy whereof was annexed to the affidavit), and had given other notice to the public that he did in fact intend to sail from this country for *North America* as soon as the said vessel had completed her cargo; that, in particular, *Gibbons* had very recently stated to Mr. *Arnold*, his broker, that he was about to sail in the said vessel from *Liverpool* for *North America*, in a few days, and that he would quit *London* for *Liverpool* on *Saturday* then next, in order to hasten the departure of the said vessel; that *Gibbons* had no fixed residence in this country; and that, for the reasons aforesaid, deponent verily believed that *Gibbons* was about to quit *England*, unless forthwith apprehended.

The learned judge said, that, in his opinion, the plaintiff had failed to make out a want of reasonable and probable cause; but, being pressed to put the case to the jury, he did so, telling them, that, to entitle the plaintiff to a verdict, they must be satisfied that there



was a total absence of reasonable and probable cause for arresting the plaintiff, and that the defendants had acted with malice. The jury returned a verdict for the defendants.

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*Stee*, Serjt., in *Easter* term last, obtained a rule nisi for a new trial, on the grounds of misdirection, and that the verdict was not warranted by the evidence.

*Channell*, Serjt. (with whom was *Bovill*), now shewed cause. To entitle the plaintiff to recover in this action, he was bound to prove a want of reasonable and probable cause, and also that the defendants were actuated by malice. Here, there was no evidence of malice at all: and there is no objection to the way in which that question was left. The jury *may* infer malice from the want of reasonable and probable cause, but they are not bound to do so. [*Maule*, J. It is rather difficult to say, that a man who causes another to be imprisoned, well knowing that he is not liable to imprisonment, is not actuated by malice. *Tindal*, C. J. If, at the time *Alison* made the affidavit, he had reason to believe that the demand was not one in respect of which a *capias* could lawfully issue, he clearly was guilty of malice.] It is impossible to deny that. The defendants are not to be held to have acted without reasonable or probable cause, and maliciously, because they have mistaken their rights, or been misinformed. [*Tindal*, C. J. If the facts had been correctly represented to the judge, he would not have made the order. There was an evident *suppression veri*. It does not, however, follow that the jury are to be held to have done wrong in not having thence inferred malice.]

*Stee*, Serjt. (with whom was *Petersdorff*), in support of the rule. It may be conceded that it was necessary for the plaintiff to establish want of reasonable and probable cause, and malice: the former is a question of



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law for the judge; the latter, one of fact for the jury. But the question of malice cannot be fairly left to the jury, if the question of reasonable and probable cause has previously been improperly decided by the judge: and, if the jury are directed to take into their consideration that which is only a question for the judge, they have the question of malice left to them in a manner which renders it impossible for them fairly to deal with it. The facts clearly shewed that there was a total want of reasonable and probable cause for arresting the plaintiff. The demand was not of a character to entitle the defendants to obtain an order for the *capias*; and, if the contract had been fairly presented to the judge, no order would have been made. The defendants well knew, that, by the terms of the contract, the guano was to be put on board the *Belle* by their correspondents at *Valparaiso*. The affidavit, therefore, was studiously and designedly false. It might be that the plaintiff had good reasons for declining to proceed to *Coquimbo*: he might have thereby avoided his insurance, or have committed a breach of the ship's articles.

TINDAL, C. J. I must confess that the inference I should have drawn from the facts, is, that there was no reasonable or probable cause for procuring the arrest of the plaintiff. That being the case, and it being possible that the jury may have come to a conclusion upon the question of malice, different from that at which they would have arrived had the question been properly presented to them, I think the rule for a new trial must be made absolute.

The rest of the court concurring,

Rule absolute. (a)

(a) The cause has not yet (Trinity vacation, 1847,) been retried, the defendants having obtained an order for a commission to examine witnesses at *Valparaiso*; which commission has not been returned.



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## REYNOLDS and Others v. FENTON.

May 29.

**A**SSUMPSIT, on a foreign judgment.

The first count of the declaration stated, that, before and at the time of the making of the promise by the defendant next hereinafter mentioned, to wit, on &c., the defendant was indebted to the plaintiff in 1000*l.* under and by virtue of a certain judgment or decree before then, to wit, on &c., made and pronounced in and by a certain lawful court in and of certain parts beyond the seas, to wit, in and of the kingdom of *Belgium*, to wit, the Tribunal of Commerce in and of the city of *Brussels*, in *Belgium* aforesaid, in and concerning a certain suit or action then depending in the same court at the suit of the now plaintiffs against the now defendant, whereby the court aforesaid did then order and adjudge the defendant to pay to the plaintiffs a certain sum, to wit, 6808 *francs*, 9 *centimes*, of current money of the said kingdom of *Belgium*, and also a certain other sum, to wit, 837 *francs*, 8 *centimes*, of like current money, together with lawful interest upon the above-mentioned sums respectively, which interest, at the time of the making of the promise of the defendant next hereinafter mentioned, amounted to a further sum, to wit, 500 *francs*, of like current money; and also a certain other sum, to wit, 29 *francs*, 32 *centimes*, of like current money, being the costs of the plaintiffs of and in the said action or suit, by the said court ordered and adjudged to be to them paid by the defendant, exclusive of and besides the costs of the said judgment, and of the giving notice thereof to whom it might concern, in

In assumpsit on a judgment or decree of the Tribunal of Commerce at *Brussels*, the defendant pleaded, that *he was not at any time served with any process* issuing out of that court, at the suit of the plaintiff's, for the causes of action upon which the said judgment or decree was obtained, *nor had he at any time notice of any such process*, nor did he appear in the said court to answer the plaintiffs: —

Held, bad, inasmuch as the plea did not shew that the proceedings against the defendant in the Belgian court were so conducted as to deprive

the defendant of the opportunity of defending himself therein.



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due form of law, which last-mentioned costs, at the time of the making of the promise of the defendant next therein-  
after mentioned, amounted to a further large sum, to wit, 200 *francs* of the like current money ; and by and through which same judgment or decree the defendant became, and at the time of the making of the promise of the defendant next thereafter mentioned was, liable to pay to the plaintiff a further sum, to wit, 200 *francs*, of like current money, for certain other costs, expenses, and disbursements of them the plaintiffs, by the plaintiffs lawfully and necessarily paid and incurred for, upon, and in respect of the said action or suit, and in and about the perfecting of the said judgment, and in order to the obtaining of the fruits thereof; which last-mentioned costs, expenses, and disbursements were, before the making of the defendant's said promise, duly and legally ascertained, and were, at the time of the making of the said promise, by the law of *Belgium* aforesaid, incidental to the said judgment or decree, and due, payable, and recoverable under and by virtue of the same, and were such, that, by the last-mentioned law, execution might, at the time last aforesaid, lawfully have been had of and for the same, under and in respect and by virtue of the said judgment or decree; which judgment or decree was, on the day and year first aforesaid, and still remained, in force and unsatisfied; and the defendant then was and remained liable to pay the plaintiffs the said several sums of current money of *Belgium* aforesaid, by virtue and in respect thereof, and which several sums of current money as aforesaid were together of great value, to wit, of the value of the above mentioned sum of lawful money of this realm; and thereupon the defendant, in consideration of the premises, theretofore, and before the commencement of this suit, to wit, on the day and year first aforesaid, promised the plaintiffs to pay them the said sum of



lawful money of this realm on request; yet the defendant had not paid the same, or any part thereof, though often thereunto requested.

Plea to the first count,—that, although the judgment or decree in that count mentioned, was in fact obtained by the plaintiffs against the defendant, *he the defendant was not at any time served with any process* issuing out of the said Tribunal of Commerce in and of the city of *Brussels*, in the kingdom of *Belgium* in that count mentioned, at the suit of the plaintiffs, for the causes of action upon which the said judgment or decree was obtained as aforesaid; *nor had he at any time notice of any such process*, nor did he the defendant at any time appear in the said court to answer the plaintiffs in the said suit or action in which the said judgment or decree was so obtained as in the count mentioned — verification.

To this plea the plaintiff demurred generally, and the defendant joined in demurrer.

*Channell*, Serjt., in support of the demurrer (a). The facts stated in this plea do not shew that the judgment declared on was contrary to natural justice, or contrary to the practice of the Belgian court: it is not stated that the defendant was not domiciled, or never was resident, in *Brussels*, so as to bring it within the principle of the cases of *Buchanan v. Rucker* (b), *Douglas v. Forrest* (c), and *Smith v. Nicholls* (d). *Cowan v. Braidwood* (e) is precisely in point. There, to a count in assumpsit on a decree of the court of session in *Scotland*, the defendant pleaded that he was not, at the time of

(a) The point marked for argument was—that it did not appear by the plea, that the judgment was obtained or made by fraud, or without jurisdiction, or in a manner repugnant to natural justice;

(b) 1 *Campb.* 63.

(c) 4 *Bingh.* 686., 1 *M. & P.* 663.

(d) 5 *New Cases*, 208., 7 *Scott*, 147.

(e) 1 *M. & G.* 882., 2 *Scott*, *N. R.* 188.

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the commencement of the action in the Scotch court, or at any time during the proceedings there, in *Scotland*, or at any place within the jurisdiction of the said court, nor was he, at any time before the making or pronouncing of the decree, in any manner according to the course and practice of the said court, notified, nor did he then know of the said several proceedings, or any of them, so that he could or might, by himself, his proctor, &c., appear or plead, or in any way defend himself in the said action, nor did he appear to any or either of the said proceedings; whereby the said decree was and is contrary to natural justice, and wholly inoperative and void: and it was held, that the plea afforded no sufficient answer to the action, inasmuch as it did not negative that the defendant was a Scotchman born, that he was resident in *Scotland* at the time the debt was contracted, or that he was possessed of heritable property there; nor *distinctly* allege that he had no notice of the proceedings. *Tindal*, C. J., there says: "There is no allegation in the plea that the defendant was not a native of *Scotland*, and subject to the laws of that country, nor that he was not domiciled there at the time the debt was contracted and the proceedings were had against him. One of the strong observations in *Douglas v. Forrest*, is, that 'a natural-born subject of any country, quitting that country, but leaving property under the protection of its laws, even during his absence owes obedience to those laws, particularly when they enforce a moral obligation.' Here, the fact of the defendant having property in *Scotland* at the time the decree against him was pronounced, is not negatived. Again, there is no [distinct] statement that the defendant had no knowledge or notice of the proceedings." And, after reading the plea, his lordship added: "This may mean that the defendant has not had that which is strictly and technically understood to amount to notice;



but it is far from being an allegation that the proceedings were so conducted that he had no cognizance of them." So, here, it is consistent with this plea, that the defendant may have had property within the jurisdiction of the foreign court, or an agent there. [Cresswell, J. The defendant does not say that he had no knowledge of the proceedings.] *Ferguson v. Mahon* (a) is rather inconsistent with the decisions in this court. There, in debt on a judgment in the court of Common Pleas in *Ireland*, the defendant pleaded, that, though the said judgment was in fact obtained by the plaintiff against the defendant, the defendant was not at any time arrested upon, or served with, any process issuing out of the said court at the suit of the plaintiff, for the cause of action upon which the said judgment was obtained as aforesaid, nor had he at any time notice of any such process, nor did he at any time appear in the said court to answer the plaintiff in the said action in which the judgment was so obtained: and that was held a good defence. [Tindal, C. J. The plea in this case is almost identical with that. *Maule*, J. I take the distinction between that case and the present to be this: the court there could take judicial notice that the law of *Ireland* is the same as the law of this country with regard to the commencement of the suit *by process*; but, how do we know that there may not be a good commencement of a suit in *Belgium* by *verbal summons* ?]

*Talfourd*, Serjt., *contra*. Where the declaration on a foreign judgment omits to state that the defendant was domiciled in the country at the time the proceedings were had against him, or that he possessed property there, it is *prima facie* enough to allege in the plea, as here, that the defendant never was served with

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(a) 11 Ad. &amp; E. 179., 3 P. &amp; D. 143.



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or had any notice of process issuing out of the tribunal the judgment of which the plaintiff seeks to enforce, and it is for the plaintiff to reply any facts that give the foreign court jurisdiction. All the authorities tend to shew that it is competent to a defendant in such a case to plead that he never was summoned, and never had notice of the proceedings. In *Ferguson v. MacLellan*, Lord Denman says, that, although an Irish judgment is a record for certain purposes, "the inquiry is still not indeed into the merits of the action, or the propriety of the decision, but whether the judgment passed on such circumstances as to shew that the court had properly jurisdiction over the party; and, when it appears as here, that the defendant has never had notice of the proceeding, or been before the court, it is impossible for us to allow the judgment to be made the foundation of an action in this country." [*Tindal*, C. J. The plaintiff does not so allege. It is quite consistent with the defendant's having stood by, cognizant of every step. *Prima facie* it must be taken that the proceedings were regular.] In *Buchanan v. Rucker* (a), Lord Ellenborough says: "It is contrary to the first principles of reason and justice, that, either in civil or criminal proceedings, a man should be condemned before he is heard." And in *Cavan v. Stewart* (b), the same learned judge says: "It is perfectly clear, on every principle of justice, that you must either prove that the party was summoned, or at least that he was *once* on the island." *Becque v. McCarthy* (c), is to the same effect. [*Maule*, J. If the plaintiff's plea had alleged, that the defendant never was served with any process, or summoned, so as to be able to defend, it might have been good. But here the defendant merely says that the plaintiff did not in the Belgu

(a) 1 *Campb.* 63., *S. C.* 9  
*East*, 192.

(b) 1 *Stark. N. P. C.* 52  
 (c) 2 *B. & Ad.* 951.



court adopt a particular course of proceeding. Can we say that it is contrary to natural justice, that a party shall be fixed with a judgment in a foreign court who has never been served with process? Or, in other words, can we hold that the issuing of process out of a foreign court is essential to natural justice?] *Primâ facie*, this plea does state all that is requisite to shew that the defendant had no means of being heard in the foreign court.

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TINDAL, C. J. The plea is clearly bad. It does not shew, substantially, that the defendant had no means of being present in the Belgian court whilst the proceedings were going on against him therein.

MAULE, J. For the reasons suggested, I think this plea clearly cannot be sustained.

The rest of the court concurred.

Talfourd, Serjt., then prayed, and obtained, leave to amend, on the usual terms.

Rule accordingly.



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## MESSENT v. REYNOLDS.

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In 1841, *B.* agreed to let to *A.* for eight years and a quarter, certain premises, "subject to the same conditions as were mentioned in the memorandum under which *B.* held of *C.*:" and it was further agreed, that, "if *C.* was willing to accept *A.* as tenant instead of *B.*, *A.* was willing to take the remainder of the lease or memorandum from *C.*, and become his tenant."

**A**SSUMPSIT. The declaration stated, that, on the 2nd of *November*, 1841, by a certain agreement then made by and between the plaintiff and defendant, the defendant agreed to let the plaintiff a certain house and premises therein mentioned, subject to the same conditions as were mentioned in a certain memorandum to him the defendant from one *Thomas Flight*, at the rent of 60*l.* per annum, free and clear of any deduction, from *Michaelmas* day then last, to be paid quarterly, 15*l.* on the then next *Christmas*, for the term of eight years and one quarter, less ten days; that, the plaintiff then thereby agreed to take the said house on the terms aforesaid; and the plaintiff then thereby further agreed, that, if the said *Thomas Flight* was willing to accept him the plaintiff as a tenant instead of the defendant, he the plaintiff was willing to take the remainder of the lease or memorandum from the said *Thomas Flight*, and become his tenant. Averment, that, the said agreement being so made as aforesaid, afterwards, to wit, on the day and year aforesaid, in consideration thereof, and that the plaintiff, at the request of the defendant, had

It appeared that *C.* was tenant to *D.*, and that, *C.*'s term expiring at *Christmas*, 1844, *D.* brought ejectment, and turned *A.* out on the 7th of *February*, 1845.

In an action by *A.* against *B.* for this eviction, the declaration, after setting out the agreement and mutual promises, alleged, that *B.* undertook and promised *A.* that he should and might "quietly use, occupy, and enjoy the premises for the term for which *B.* had so agreed to let them as aforesaid:" —

Held, that no such promise could be implied from the contract set out in the declaration, the contract being subject to conditions the nature of which were not disclosed.

*Quære* whether a contract for quiet enjoyment can be implied by law from a mere agreement to let.



then undertaken and promised the plaintiff to perform and fulfil the said agreement in all things on the plaintiff's part and behalf to be performed and fulfilled, he the defendant undertook, and then faithfully promised the plaintiff to perform and fulfil the said agreement in all things on the defendant's part and behalf to be performed and fulfilled, and that he the plaintiff should and might quietly use, occupy, possess, and enjoy the said premises for the said term for which the defendant had so agreed to let them as aforesaid; that, the said agreement having been so made as aforesaid, the plaintiff, to wit, on the day and year first aforesaid, entered into and upon, and became, and from thence was, tenant of the said premises to the said defendant, for the said term so to him thereof granted as aforesaid; that, although the plaintiff had performed all things in the agreement on his part and behalf to be performed and fulfilled, yet the defendant had disregarded his promise, in this, to wit, that he the defendant had not at any time any right or title to demise the said premises for the said term for which the defendant had agreed to let them to the plaintiff as aforesaid; and that he the plaintiff could not, and did not, use, occupy, possess, and enjoy the said premises for the said term, by and through the want of right and title in the defendant to demise them for the said term; and that, afterwards, and during the continuance of the said term, and while the plaintiff was in possession of the premises, to wit, on the 1st of *January*, 1845, one *Mary Ann Duell*, who then had lawful right and title to enter into and on the said premises, and have, take, possess, and enjoy the same, and evict the plaintiff therefrom—such right and title of the said *Mary Ann Duell* then being by virtue of an estate and interest of and in the said premises, created and existing before the demise to the plaintiff, and such right and title of and in the said *Mary Ann*

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- Duell* not being derived from, through, or by the plaintiff—entered into and upon the said premises in the possession of the plaintiff; and afterwards, to wit, on the day and year last aforesaid, then having the lawful right and title aforesaid, not derived by, from, or through the plaintiff, commenced and brought, and caused to be commenced and brought, a certain action of ejectment in the court of Common Pleas at *Westminster*, wherein one *John Doe* was the plaintiff, and sought to recover the possession of a certain term of and in the said premises to him the said *John Doe* by the said *Mary Ann Duell* granted; and such proceedings were thereupon had, that, afterwards, to wit, on the 20th of *January*, 1845, it was considered in and by the said court that *John Doe* should recover his said term; and the said *Mary Ann Duell*, then having the lawful right and title aforesaid, not derived by, from, or through the plaintiff, to wit, on the day and year last aforesaid, in the name of *John Doe*, sued and prosecuted out of the said court a certain writ of our Lady the Queen, called a writ of *habere facias possessionem*, whereby the sheriff of *Middlesex*, in whose bailiwick the premises were situated, was commanded to cause *John Doe* to have possession of his said term then still to come; by means whereof, and of the several premises aforesaid, the said *Mary Ann Duell*, having such lawful right and title as aforesaid, not derived by, from, or through the plaintiff, afterwards, to wit, on the 6th of *February*, 1845, lawfully and rightfully evicted, expelled, and amoved the plaintiff from the possession, use, occupation, and enjoyment of the said premises, and from thence continually had lawfully and rightfully kept and continued the plaintiff expelled and amoved therefrom; by means of which several premises, the plaintiff had not only lost and been deprived of the use, benefit, and enjoyment of the said premises, for the said term so to him thereof by the defendant



granted as aforesaid, but had been put to divers great expenses in and about defending his possession thereof, amounting in the whole, to wit, to 50*l.*; and had become liable to pay, and had paid, and necessarily undertaken and agreed to pay, to the said *Mary Ann Duell*, as and for compensation for the unlawful possession by him the plaintiff of the said premises, and as and for compensation for the expenses and costs incurred by the said *Mary Ann Duell* in recovering possession thereof, divers other large sums of money, amounting, to wit, to 60*l.*; and had also lost and been deprived of divers fixtures, chattels, and effects, of great value, to wit, of the value of 100*l.*, by him the plaintiff fixed and attached to the said premises, &c.

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The defendant pleaded — first, non assumpsit — secondly, as to the promise that the plaintiff should and might quietly use, occupy, possess, and enjoy the said premises for the said term in the declaration mentioned, and the supposed causes of action in respect thereof, that the plaintiff did not enter into or upon, or become, nor was he, tenant of the said premises to the defendant, for the said supposed term in the declaration mentioned, in manner and form as in the declaration alleged. Issue thereon.

By order of *Maule, J.*, the following case (of which the pleadings were to be taken as part) was stated for the opinion of the court: —

On the 2nd of *November*, 1841, the plaintiff and defendant entered into an agreement, of which the following is a copy: —

“ Mem. of an agreement made this 27th of *October*, 1841, between *Thomas Reynolds* and *Samuel Messent*.

“ I, *Thomas Reynolds*, do agree to let *Samuel Messent* the house and premises, 159, *Ratcliffe Highway*, subject to the same conditions as are mentioned in the mem. to



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me from Mr. *Flight*, at the rent of 60*l. per annum*, free and clear of any deduction, from *Michaelmas* day last; to be paid quarterly (on *Christmas* next 15*l.*), for the term of eight years and a quarter, less ten days.

(Signed) “*Thomas Reynolds.*”

“ I, *Samuel Messent*, do agree to take the house, 159, *Ratcliffe Highway*, on the above conditions, *viz.*, to be subject to the same conditions as are mentioned in the mem. to Mr. *Reynolds* from Mr. *Flight*, at the rent of 60*l. per annum*, payable quarterly; rent to be paid from *Michaelmas* last, free and clear of any deduction, for the term of eight years and one quarter, less ten days.

(Signed) “*Samuel Messent.*”

“ 2nd *November*, 1841.”

“ It is further agreed, that, if Mr. *Flight* is willing to accept Mr. *Messent* as a tenant, instead of me, *Thomas Reynolds*, that I, *Samuel Messent*, is willing to take the remainder of the lease or mem. from Mr. *Flight*, and become his tenant.”

(Signed) “*Samuel Messent.*”

“ 2nd *November*, 1841.”

The plaintiff entered upon the occupation of the premises in *November*, 1841, paid rent to the defendant, and continued to occupy them until the 7th of *February*, 1845, when he was evicted as hereinafter mentioned.

The defendant's interest in, and title to the premises, was all derived through *Flight*; and *Flight's* interest was as tenant to *Mary Ann Duell*. *Flight's* term expired on the 25th of *December*, 1844, and *Mary Ann Duell* became entitled to the possession of the premises, to recover which she brought an ejectment. Due notice of the proceedings was given to the defendant. No defence to the action was offered, and Mrs. *Duell*



recovered, and issued her writ of possession, under which the plaintiff was turned out of possession by the sheriff.

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The question for the opinion of the court was, whether or not the plaintiff was entitled to recover in this action; and judgment for the plaintiff or the defendant was to be given, as the court should think fit.

*Talfourd*, Serjt., for the plaintiff. The instrument declared on amounts to a lease. (a) The declaration sets forth the agreement to demise for eight years and a quarter, and then states what the law infers from such an assumption to demise, viz., an undertaking by the defendant, that he defendant had lawful right to demise, and alleges an eviction of the plaintiff by title paramount. [*Maule*, J. The question will be, whether there was any covenant on the part of the defendant for quiet enjoyment.] If a man agrees to let, he covenants that he has title to let. [*Channell*, Serjt. The argument on the part of the defendant will be, that, taking the instrument declared on to be a lease, there is no covenant, express or implied, for quiet enjoyment: and, taking it to be an agreement for a lease only, it does not support the breach; the plaintiff should have shewn that the plaintiff did not, within a reasonable time, make a good title.] It is not contended that the plaintiff could recover unless this is a lease, which according to the more recent decisions it unquestionably is. [*Maule*, J. Clearly, it is a lease. The question is, whether a general covenant for quiet enjoyment is to be inferred from this instrument. *Tindal*, C. J., referred to *Nokes's* case (b), where it was resolved that a writ of covenant lay at the suit of an assignee upon the covenant

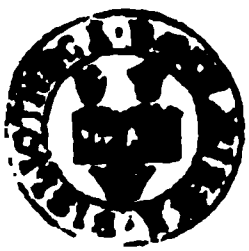
(a) Being executed before  
Jan. 1, 1845. *Vide* 7 & 8 Vict.  
c. 76.; 8 & 9 Vict. c. 106.

(b) 4 Co. Rep. 80. b.



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implied by law from the words “demise, grant,” &c.] It may be conceded, that a covenant or promise for quiet enjoyment does not arise from the mere relation of landlord and tenant. It was so held in *Granger v. Collins*. (a) There is no magic in the word “demise:” it is only from the presumed intention of the parties that a covenant for quiet enjoyment is implied from it. [Maule, J. The parties were contracting in respect of premises held under lease from *Flight* to the defendant: if the defendant’s lease from *Flight* was put an end to, there was an end of this agreement between the plaintiff and the defendant. The plaintiff, by this memorandum, agrees to take the premises “subject to the same conditions as are mentioned in the memorandum” from *Flight* to the defendant. What those conditions are, is not stated. The defendant agrees to let to the plaintiff *on the same conditions*. Surely we cannot infer from that, a *general* agreement that the plaintiff shall quietly enjoy the premises for the full term of eight years and a quarter.] It does not lie in the mouth of the defendant to say that the conditions under which he held of *Flight* were such as to prevent him from granting that which he by his agreement purported to grant.

*Channell*, Serjt. (with whom was *Hoggins*), for the defendant. A contract for quiet enjoyment to the extent here alleged, is not to be inferred from the language of the agreement declared on; and therefore the defendant is entitled to a verdict on non assumpsit. [Maule, J. The parties, clearly, never meant that the defendant should give a better title than was to be had by performing the conditions in the agreement with *Flight*. It is perfectly consistent with the statements in this declaration, that, under *Flight*’s agreement, Mrs. *Duell* had a good right to enter.] The declaration should

(a) 6 M. & W. 458.



have set out that the agreement was made subject to certain conditions. In *Jackson v. Cobbin* (a), the declaration, in assumpsit, stated that the defendant agreed to let, and the plaintiff to take, a certain messuage and premises on certain specified terms, and that afterwards, in consideration of the premises, and that the plaintiff, at the request of the defendant, had promised the defendant to perform his part of the agreement, the defendant promised the plaintiff to perform his part of the agreement, and that he then had power to let the messuage and premises to the plaintiff *without restriction as to the purpose for which the same should be used and occupied*: and it was held, that such a promise could not be implied from the relation of the parties, and that the consideration alleged was insufficient to sustain it. That the word “demise” in a *lease*, imports a covenant in law for quiet enjoyment — at least during the continuance of the estate out of which the term is granted — will not be disputed: it is laid down as a clear and indisputable proposition in *Adams v. Gibney*. (b) But no authority can be cited to shew that such a warranty can be implied in the case of a parol contract.

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TINDAL, C. J. It appears to me, that, upon the facts and the pleadings in this case, the plaintiff is not entitled to recover. We are asked to imply from the agreement set out in the case, a covenant on the part of the defendant that the plaintiff should and might quietly use, occupy, possess, and enjoy the premises for the term for which the defendant had agreed to let them. It may be that a covenant for quiet enjoyment may be implied from a mutual agreement to let and to take. But, passing that by, it ought at all events to appear that there

(a) 8 M. & W. 790.

P. 491. And see *Williams v.*

(b) 6 Bingh. 656., 4 M. & Burrell, *antè*, Vol. I. p. 402.



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is an absolute agreement to demise for a term : whereas, if this agreement be looked at, it will be seen that the defendant does not agree to demise to the plaintiff absolutely for eight years and a quarter, but “subject to the same conditions as are mentioned in the memorandum to him from Mr. *Flight*.” How are we to say that the conditions to which reference is thus made do not apply to the term ; and, that it might not be legally determined, or that it was not avoided by some breach of the conditions ? The inference, therefore, which the plaintiff seeks to draw in his declaration, is one that is not supported by law. I think our judgment must be for the defendant.

COLTMAN, J. I am of the same opinion. In order to justify us in saying that a warranty or covenant for quiet enjoyment may be implied here, the plaintiff should have shewn what were the conditions referred to in *Flight*’s agreement. *Adams v. Gibney* shews that the binding force of the word “ demise ” is only co-extensive with the estate out of which the lease is granted. Here that is not sufficiently disclosed.

MAULE, J. This is an agreement to let premises for a given term, subject to certain conditions. The declaration, after setting out the agreement, and alleging mutual promises, goes on to state that the defendant undertook and promised that the plaintiff should and might quietly use, occupy, possess, and enjoy the premises for the term — not saying, subject to the conditions. It may be that one of those conditions affected the term. The objection is one that goes to the merits. The object of the parties may have been to place the plaintiff in the position of tenant to *Flight*, instead of that of tenant to the defendant. But this declaration is framed on the assumption that the defendant promised



in the character of one having power to grant for an absolute and indefeasible term.

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CRESSWELL, J. I also am of opinion that the defendant is entitled to judgment. The plaintiff declares for a breach of the defendant's promise that he should have quiet enjoyment of the premises demised to him. There is no evidence of an express contract for quiet enjoyment: but it is said that the law will imply it from the agreement set out. That is an agreement to let for a certain term, subject to the same conditions as are mentioned in a former agreement between the defendant and *Flight*. But, how can we imply any such contract from an agreement subject to conditions that are not set out? Even assuming that the word "let" in an agreement, is equivalent, to "demise" in a lease under seal (which I am not prepared to admit), that would only raise an implied covenant co-extensive, according to *Adams v. Gibney*, only with the estate out of which the lease is granted. Upon that ground; also, I think the plaintiff is precluded from recovering here.

Judgment for the defendant.



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## SUTTON v. PAGE.

June 1.

To a count by indorsee against acceptor of a bill of exchange, the defendant pleaded, that, after the accruing of the causes of action in the declaration, and before the commencement of the suit, the defendant and plaintiff accounted together of and concerning the said causes of action, *and all other claims and demands then being between the plaintiff and the defendant*; and that, on that accounting, a certain sum only was found due to the plaintiff,

**A**SSUMPSIT by indorsee against the acceptor of a bill of exchange for 120*l.* 5*s.*, dated the 20th of *December*, 1845, payable three months after date.

Pleas — first, that the bill of exchange in the declaration mentioned was not accepted and indorsed in manner and form as therein alleged — secondly, that, after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, the defendant and the plaintiff accounted together of and concerning the said causes of action, *and all other claims and demands then being between the plaintiff and the defendant*, and then amounting to a certain large sum of money, to wit, 1000*l.*; and, on that accounting, a certain small sum of money, and no more, to wit, the sum of 50*l.*, was then found to be, and then was, due and owing from the defendant to the plaintiff; which sum of money the defendant then, in consideration of the premises, promised the plaintiff to pay him on request; that thereupon the defendant, afterwards, and before the commencement of the suit, paid to the plaintiff, who then accepted and received of and from the defendant, a large sum of money, to wit, 50*l.*, in full satisfaction and discharge of such last-mentioned sum so due and owing from the defendant to the plaintiff as last aforesaid — verification.

Replication to the second plea — that the plaintiff

which sum the defendant paid, and the plaintiff received in full satisfaction of the sum so due and owing as last aforesaid.

The plaintiff replied, that he and the defendant did not account together of and concerning the causes of action in the declaration, *and of all other claims and demands then being between the plaintiff and the defendant, modo et formâ* : —

Held, on demurrer, that the traverse was well taken.



and defendant did not account together of and concerning the said causes of action in the declaration mentioned, *and of all other claims and demands then being between the plaintiff and the defendant*, in manner and form as in the second plea was alleged — concluding to the country.

Special demurrer, assigning for causes, amongst others, that the traverse taken in and by the said replication was improper and too large, in this, that the plaintiff thereby denied that the plaintiff and defendant accounted together of and concerning the causes of action in the declaration mentioned, *and all other claims and demands then being between the plaintiff and the defendant*; whereas, if the said accounting was of and concerning the said causes of action *and any other claim or demand then being between the plaintiff and the defendant*, the plea would be a sufficient answer to the action; and the replication should have denied that such accounting as aforesaid was of or concerning the said causes of action *and any other claim or demand between the plaintiff and the defendant*, and was insufficient in its present form, in that it tended to oblige the defendant to prove more than was necessary for the support of his plea, and was thereby informal, too large, uncertain, and insufficient — that the issue tendered in and by the replication, was, for the causes above first assigned, immaterial, and that it was beside the merits of the plea, and of this action, to inquire whether the said accounting was of and concerning all other claims or demands between the plaintiff and defendant, or not — that the traverse was too large, in denying that the accounting was of and concerning the whole of the causes of action in the declaration mentioned, and should have denied, disjunctively, that such accounting was of and concerning such causes of action, or any part thereof, &c.

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*Channell*, Serjt., on a former day in this term, obtained a rule nisi to set aside the demurrer as frivolous, and sign judgment as for want of a rejoinder. He submitted that the replication traversed the only material part of the plea.

*Gaselee*, Serjt., *contra*, contended that the demurrer was well founded; or, that, at all events, it was not so clearly frivolous as to warrant the court in interfering in a summary way. [*Tindal*, C. J., observing that the replication took issue in the very terms of the plea, said that, if the defendant would abide by his demurrer, it might stand for argument on *Wednesday* next; but *Gaselee* signified his readiness to proceed at once.] The first objection to the replication is, that it traverses too much, and puts the defendant to a larger proof than his plea imposes upon him. In *Stephen on Pleading* (a), it is said, that, "As a traverse must not be taken on an immaterial allegation, so, when applied to an allegation that is material, it ought in general to take in no more and no less of that allegation than is material. If it involves *more*, the traverse is said to be too *large*; if less, too *narrow*. A traverse may be too large by involving in the issue, quantity, time, place, or other circumstances, which, though forming part of the allegation traversed, are immaterial to the merits of the cause. Thus, in an action of debt on a bond conditioned for the payment of 1550*l.*, the defendant pleaded that part of the sum mentioned in the condition, to wit, 1500*l.*, was won by gaming, contrary to the statute in such case made and provided; and that the bond was consequently void. The plaintiff replied, that the bond was given for a just debt, and traversed that the 1500*l.* was won by gaming, in manner and form as alleged. On

(a) 5th edit. p. 279.



demurrer, it was objected that the replication was ill, because it made the precise sum parcel of the issue, and tended to oblige the defendant to prove that the whole sum of 1500*l.* was won by gaming; whereas, the statute avoids the bond if *any part* of the consideration be on that account. The court was of opinion, that there was no colour to maintain the replication; for, that the material part of the plea was, that *part* of the money for which the bond was given was won by gaming; and that the words, “to wit, 1500*l.*,” were only form, of which the replication ought not to have taken any notice. (a) So, where the condition of a bond was, that the obligor should serve the obligee half a year, and, in an action of debt on the bond, the defendant pleaded that he had served him half a year at *D.*, in the county of *K.*, and the plaintiff replied, that he had not served him half a year at *D.*, *in the county of K.*, this was adjudged to be a bad traverse, as involving the *place*, which was immaterial. (b) So, where the plaintiff pleaded that the Queen, at a manor court held on such a day, by *J. S.*, her steward, and by copy of court roll, &c., granted certain land to the plaintiff’s lessor, and the defendant rejoined, traversing that the Queen, at a manor court held such a day, by *J. S.*, her steward, granted the land to the lessor; the court held, that the traverse was ill, “for, the jury are thereby bound to find a copy on such a day, and by such a steward; which ought not to be.” The traverse, it seems, ought to have been, “that the Queen did not grant *in manner and form as alleged* (c), words which bring into issue only the substance of the allegation.” So, here, the replication should have been, that the plaintiff

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(a) *Colborne v. Stockdale*,  
Str. 493., 8 Mod. 58.

(b) *Doct. PL* 360.

(c) *Lane v. Alexander*, Yelv.  
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and the defendant did not account together of and concerning the causes of action in the declaration mentioned, *modo et formâ*, without noticing the other claims and demands. (a) *Palmer v. Ekins* (b) is also an authority to shew that this traverse is too large. In *Stephen* (c), it is further said, that “a traverse may be too large, by being taken in the *conjunctive*, instead of the *disjunctive*, where it is not material that the allegation traversed should be proved conjunctively.” Most of the authorities are collected in the notes to *Goram v. Sweeting* (d): “where, in an action on the case for a false return of *nulla bona*, the declaration alleged that the defendant (the sheriff) *seized and took* in execution, divers goods and chattels, of the value of the moneys directed to be levied, and then *levied* the same thereout; and the defendant pleaded, that he did not seize or take in execution any goods or chattels, *and* levy the moneys directed to be levied *modo et formâ*; it was held, that the plea was bad, as the issue tendered was too large; for, the defendant, by the issue tendered, would render it incumbent on the plaintiff to prove that the goods were seized, and the money levied out of them; whereas, the sheriff would be liable if he seized, whether he sold or not. (e) So, where, to an action on an attorney’s bill, the plea was that it was brought for fees at law *and* in equity, and no bill delivered; and the replication traversed that it was brought for fees at law *and* in equity; this was held ill, for, the defence would have been good if the action were brought for either. (g) And, wherever the effect of the replication is to compel the defendant

(a) *Vide post*, p. 210 (a).(b) 2 *Str.* 818., 2 *Ld. Raym.* 1550.

(c) Page 281.

(d) 2 *Wms. Saund.* 207 a., n. (m).(e) *Stubbs v. Lainson*, 1 *M. & W.* 728. And see *Drews v. Lainson*, 11 *Ad. & E.* 529.(g) *Moore v. Boulcott*, 1 *Bingh. N. C.* 328., 1 *Scott*, 122.



to prove more than he otherwise would have been bound to do in support of his plea, it is bad. (a) Thus, where, to an action on a bill of exchange, by the indorsee against the acceptor, the defendant pleaded, that, after the indorsement, and before the commencement of the suit, the plaintiff indorsed and delivered the bill to a person whose name was to the defendant unknown, and that the defendant then became, and still is, liable to pay the amount to the said person to whom it was so indorsed, and who from the time of that indorsement hitherto has been, *and is*, the holder thereof; and the plaintiff replied, that, at the time of the commencement of this suit, he the plaintiff was, and still is, the holder of the said bill, — without this that any other person is the holder thereof, *modo et formâ* as in the plea alleged; it was held, that this replication was bad, as the traverse was too large, inasmuch as it made it incumbent on the defendant to shew that another person, and not the plaintiff, was the holder, both at the commencement of the action and at the time of the plea pleaded, and the latter fact was immaterial. (b) And in *Comyns's Digest* (c) it is laid down, that “a traverse larger than can be denied, is bad; as, in intrusion, if it be alleged that possessions of a college of deans and canons of *E.* founded *apud Westminster*, by dissolution &c., came to the King, and the defendant intruded, &c.; the defendant says, that the foundation was by another name, *etque hoc* that it was founded *apud Westminster*, by the name alleged; it is a bad traverse, because it extends to the *place* of the foundation.” The replication is also bad as taking issue on an immaterial allegation. The proper issue would have been upon the payment in

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(a) Per Parke, B., 10 M. & W. 638, 639.

(b) *Basan v. Arnold*, 6 M. & W. 559. And see *Fisher v.*

*Ford*, 12 Ad. & E. 654., 4 P. & D. 347.; *De Medina v.*

*Norman*, 9 M. & W. 820.

(c) *Tit. Pleader*, (G. 15.).



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satisfaction: whether the parties accounted of and concerning other matters, was altogether immaterial.

TINDAL, C. J. The plea in question alleges an accounting and a payment of the sum found due. Unless it had alleged both, it would have been no answer to the action. The plaintiff in his replication has thought fit to take issue upon the accounting. The plea states the accounting to have been, not only of and concerning the causes of action in the declaration mentioned, but also of and concerning all other claims and demands then being between the plaintiff and defendant; and alleges a reduction of the balance on such accounting, to 50%, and payment of that sum. The plaintiff in his replication says, that the plaintiff and defendant did not account together of and concerning the said causes of action in the declaration mentioned, and of all other claims and demands then being between the plaintiff and the defendant, in manner and form, &c. The defendant objects, that in this the plaintiff has followed him too closely, and that the traverse should have been limited to the accounting of and concerning the causes of action in the declaration mentioned. (a) But, if the plaintiff had so shaped his traverse, there would have been a short answer, viz. that the accounting was also of and concerning other matters, which other matters turned the balance against the plaintiff, and so the traverse would have been too narrow. Most of the cases cited by the defendant are cases of traverses of matter alleged in the declaration, which is widely different from a distinct allegation in a plea.

COLTMAN, J. I also think the traverse in this case is well taken; and that it falls within the rule stated in

(a) It was so *argued*; but the demurrer appears to have proceeded on the ground that the introduction of any one claim into the account *beyond* the cause of action declared on, would have been sufficient to support the plea.



*Stephen on Pleading (a)* — that “a party may, in general, traverse a material allegation of title or estate, to the extent to which it is alleged, though it need not have been alleged to that extent; and such traverse will not be considered as too large.”

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MAULE, J. I also think this replication sufficient: it traverses a material allegation in the plea. The defendant must be taken to admit the acceptance, and to seek to get rid of his liability, by stating an accounting with the plaintiff of and concerning the bill *and* all other claims and demands between the parties. If the plea is true, it discloses a specific defence. The replication traverses that the accounting alleged by the defendant, took place. The distinction is well known between allegations that lie in quantity and are divisible, and those that involve matters of description only, which, if traversed, must be proved as alleged. Here, the plea involves an agreement between the parties that they would account respecting the bill and all matters in difference. That is a description of the accounting, which, if traversed, must be proved in its entirety. Suppose the plea had alleged a submission to arbitration of the cause and all matters in difference, and that a sum of 50*l.* had been found due, and had been thereupon paid by the defendant to the plaintiff. Upon a traverse of that plea, the whole must have been proved. It is no answer to say, that something short of that statement might have amounted to a defence. The whole is matter of *description*, which must be proved in its entirety. It is not a divisible allegation, that may be proved in part; as in the case of the ship and cable, in *Goram v. Sweeting*. For these reasons I think it quite clear that this is a good replication; and consequently that the plaintiff is entitled to judgment.

(a) Page 282.

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CRESSWELL, J. I think this demurrer is clearly frivolous ; and that, at all events, the replication is not open to the objections urged against it.

Judgment for the plaintiff. (a)

(a) *Quære*, whether the plea was not bad, for not shewing that the account embraced any claim or demand *against* the plaintiff. If *A.* sells a horse to *B.* for 50*l.*, and afterwards *B.* sells an ox to *A.* for 10*l.*, and they account together, and strike a balance, *A.* exchanges his right of action for 50*l.* against an extinction of the debt of 10*l.* and a new right of action for 40*l.* But, if *A.* is the seller of both horse and ox, an accounting amounts to nothing more than an acknowledgment of the antecedent liability. And see *antè*, Vol. I. 869. n.

If, in the principal case, the

plea had shewn that *mutual* claims had been thrown into the account, the number of the cross demands would appear to be immaterial. Supposing *Page* had pleaded that he and *Sutton* accounted together “ of and concerning the said causes of action,” and also of and concerning certain claims and demands then due from the plaintiff to the defendant for goods sold, *and* for work and labour, *and* for money lent, it could hardly have been contended that this conventional set off was matter of indivisible description, and not matter of divisible allegation.

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### HAMMOND v. COLLS.

June 2.

The court refused to allow a replication to be amended after the lapse of a year after judgment pronounced on demurrer, the case having previously stood over that the parties might mutually agree to amend, and both having declined to do so.

**TRESPASS.** The first count charged the defendant with breaking and entering a messuage, farm, and lands, and treading down and trampling down, &c., the crops thereon growing ; and seizing, taking, and carrying away the said crops, and converting and disposing of the same to the defendant's use. The second and fourth counts charged an expulsion of the plaintiff and his family from the farm and dwelling-house.

The eighth plea, to these counts, after setting out a lease by indenture from *A.* to the plaintiff, which contained covenants by the plaintiff that he would not, at any time during the term, sow, reap, or take from the arable lands demised, or any part thereof, more than two crops of any sort of corn or grain successively, but would, every third year, summer-fallow or lay the said



arable lands down with rye-grass and clover seeds, or would plant with potatoes, or sow with peas or beans, which should be twice well hoed; and also that the plaintiff, his executors, &c., should not, at any time during the term, let, assign, or set over, or otherwise part with the indenture of lease, or the premises thereby demised, without the special licence and consent of A., his heirs and assigns, in writing — with a power of re-entry for breach of any covenant in the lease — and setting out a grant by indenture of the reversion to the defendant — stated, that, after the making of those indentures, &c., the plaintiff did set over and part with the said indenture of lease, and the term thereby created, within the true intent and meaning of the said indenture of lease, and the proviso and condition for re-entry therein contained, *to wit, by pawning, pledging, and mortgaging the said indenture of lease to and with certain creditors, to wit, B. and C., without the consent of A. or of the defendant.* To this plea the plaintiff replied, that he did not set over or part with the said indenture of lease, or the term thereby created, within the true intent and meaning of the said indenture of lease, and the proviso and condition for re-entry therein contained, *by pawning, pledging, or mortgaging the said indenture of lease to and with the said supposed creditors of him the plaintiff in that behalf mentioned, or either of them, modo et formâ.* To this replication, as well as to the replication to a further plea (the tenth) pleaded in bar to the same counts, the defendant demurred specially.

Upon the argument of the demurrers, the court suggested that both parties should amend, without costs — the plaintiff, his replication to the eighth plea; and the defendant, by withdrawing his demurrer to the replication to the tenth plea, and taking issue thereon. To this proposal the defendant refused to accede; and neither party having, after some negotiation between the parties, applied to amend his own defective pleadings *upon pay-*

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*ment of costs*, the court, in the last *Trinity* vacation, pronounced judgment for the defendant on the demurrer to the replication to the eighth plea—holding that the replication ought to have denied, generally, that the plaintiff had parted, *i. e.* in *any* manner parted, with the indenture, instead of confining the issue to the particular mode of parting with it, immaterially stated, under a *scilicet*, in the plea; and for the plaintiff on the demurrer to the replication to the tenth plea. (a)

*Manning*, Serjt., for the plaintiff, now moved for leave to amend his replication to the eighth plea, or to add a count. [*Maule*, J. You should have made your election while the matter stood over for that purpose; or, at all events, you should have applied at the time the judgment was pronounced. I think it is now too late.] The power of the court to amend is almost without limit. Amendments have been allowed after much greater lapse of time: and even after judgment and a writ of error brought and argued: *Richardson v. Mellish*. (b) [*Cresswell*, J. That was not an amendment of the pleadings. *Maule*, J. You are not without remedy: you may bring a new action.]

*Per curiam*. We think we have no power, under the circumstances, to allow the proposed amendment. It is now nearly a year since the judgment was pronounced. And we delayed giving it for a considerable time to give the parties an opportunity to amend; the amendment now prayed being at that time the very subject-matter of discussion. We think we ought not to interfere with the bargain (c) then made.

*Manning* took nothing.

(a) *Vide antè*, Vol. I., p. 916., 3 *D. & L.* 164.

(b) 3 *Bingh.* 346., 11 *J. B. Moore*, 104. And see *Mellish*

*v. Richardson*, 7 *B. & C.* 819., 9 *Bingh.* 125., 2 *M. & Scott*,

191., 1 *Clark. & Fin.* 294

(c) *Quære*, between whom?



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DOE dem. BAILEY and Others v. FOSTER.

June 2.

**EJECTMENT**, for a messuage and land situate at *Walthamstow*, in the county of *Essex*.

By a memorandum of agreement, dated the 23rd of *June*, 1842, made between *A.*, as agent for and on behalf of the churchwardens of the parish of *St. M.* (not naming them), of the one part, and *B.* of the other part, it was agreed (provided a licence could be obtained from the lord of the manor, and upon *B.* putting the

The declaration contained four demises, each being laid on the 25th of *June*, 1845, — the first, by *Robert Bailey* and *Richard Bedford Allen*, churchwardens, and *George Collard* and *Alfred Janson*, overseers, of the parish of *St. Mary, Walthamstow* — the second, by *James Pistor* — the third, by *Charles Webber* and *John Budd* — the fourth, by *John Stoker* and *Robert Bailey*.

The cause was tried before *Alderson, B.*, at the last assizes for the county of *Essex*. It appeared that the premises in question had been held by the defendant under the following agreement, which when produced bore a 20s. agreement stamp : —

“Memorandum of agreement made this 23rd of *June*, 1842, between *H. F. Gadsden*, as agent for and on behalf of the churchwardens of the parish of *St. Mary, Walthamstow*, in the county of *Essex*, of the one part, (premises into repair) that the churchwardens should grant a lease to *B.* for twenty-one years from *Midsummer*-day then next, under the clear yearly rent of 30*l.*; such lease to contain covenants for payment of rent and taxes, and to repair, insure, not to commit waste, &c., and all other usual and proper covenants, &c.; and *B.* agreed to accept such lease, and execute a counterpart, &c., and that, until such lease and counterpart should be granted, the said yearly rent should be payable and recoverable by distress or otherwise, in like manner as if such lease and counterpart had been executed : —

Held, that this instrument was properly stamped as an *agreement*.

Held, also, that the tenancy thereby created — whether a tenancy from year to year (which the court thought it was), or a tenancy at will — was properly put an end to by a notice to quit and deliver up possession, given by persons acting as agents for *C.* and *D.* who were churchwardens at the time the agreement was made and *B.* let into possession; notwithstanding the notice purported also to have been given on behalf of the churchwardens and overseers in office when the notice was served, and did not state to whom the possession was to be delivered up.

The statute 59 *G. 3. c. 12. s. 17.* does not apply to copyholds.



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and *John Foster*, of *Rotherfield Street, Islington*, in the county of *Middlesex*, of the other part :

“ The said *H. F. Gadsden* hereby agrees (provided a licence can be obtained from the lord of the manor in which the hereditaments and premises hereinafter particularly mentioned are situate, but without any right in the said *John Foster*, his executors, administrators, or assigns, to require the sanction of the poor-law commissioners, or the board of guardians of the union in which the said parish is comprised, and upon the said *John Foster* putting the said messuage or tenement, buildings, and premises, into a good and tenantable state of repair,) that the said churchwardens shall grant and execute, or cause or procure to be granted and executed, unto the said *John Foster*, his executors, administrators, and assigns, a lease of all that piece or parcel of land lying and being in *Walthamstow* aforesaid, heretofore (with other land and buildings thereon belonging to Sir *R. Fitzwygram*) in the occupation of Mr. *Saltmer*, and late of Mr. *Brown*, and now unoccupied ; and also all that messuage or dwelling-house and appurtenances standing and being thereon (except timber and timber-like trees growing thereon, and except the tenant's fixtures in and about the same, for the removal of which the said Mr. *Saltmer* is to be at liberty to enter upon the premises as may be necessary, provided the said *John Foster*, his executors, administrators, or assigns, shall not become the purchaser thereof ) to hold to the said *John Foster*, his executors, administrators, and assigns, for the term of twenty-one years from *Midsummer-day* next, at and under the clear yearly rent of 30*l.*, payable quarterly, free from all taxes, tithes, or rent-charges in lieu of tithes, and all deductions whatsoever, except income and property-tax ; such lease to contain covenants for payment of rent and taxes, to repair and keep in repair, not to use the



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said agreed-to-be-demised messuage or tenement other than as a private dwelling-house, to insure the premises in 500*l.* at the least, and the usual power to enter and see to state of repairs, to cut and carry away timber, and to re-enter on non-payment of rent or non-performance of covenants; and all other usual and proper covenants, clauses, provisoes, and agreements: And the said *John Foster* hereby agrees to except such lease and execute a counterpart thereof (such lease and counterpart to be prepared by the solicitor to the said parish), and to pay the expense thereof, and of and relating to such licence so to be obtained as aforesaid, and of this agreement, the said churchwardens hereby agreeing to allow to the said *John Foster*, his executors, administrators, or assigns, the sum of 3*l.* 15*s.* out of the first quarter's rent payable in respect of such premises; and that, until such lease and counterpart shall be granted, the said yearly rent shall be payable and recoverable, by distress or otherwise, in like manner as if such lease and counterpart had been executed. As witness," &c.

It appeared that a draft lease had been prepared and sent to the defendant's solicitors, who returned it with an intimation that the defendant did not then require a lease to be executed, but that, whenever a lease was executed, it must be a legal and valid instrument.

On the part of the defendant, it was objected that the above instrument should have been stamped with a 30*s.* lease stamp; or, if it amounted to no more than an agreement, that, inasmuch as it was stamped after the 7 & 8 *Vict. c. 21.* came into operation, it should have been impressed with the 2*s.* 6*d.* stamp imposed by that statute. Upon this point the learned baron reserved to the defendant leave to move to enter a nonsuit.

The plaintiff then put in a notice to quit, dated the 21st of *November*, 1844, by *John Stoker* and *Robert*



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*Bailey*, who were proved to have been at that time churchwardens of the parish of *St. Mary, Walthamstow*.

It was thereupon objected, for the defendant, that there was no evidence that the premises were parish property, or that the requisites of the statute 59 G. 3. c. 12. s. 17. had been complied with; and that, at all events, the notice should have been given by the churchwardens *and overseers*, and should have so described them.

The plaintiff then gave in evidence the following notice to quit, signed by Messrs. *Hindman & Howard*, the attorneys for the lessors of the plaintiff; but it did not appear that they were authorized in writing by the persons on whose behalf the notice was stated to be given, to give such notice (a) : —

“ We, the undersigned, as agents for and on behalf of *Charles Webber* and *John Budd*, late churchwardens of the parish of *St. Mary, Walthamstow, Essex*, and *John Stoker* and *Robert Bailey*, the present churchwardens of the said parish, and *Edward Wigram* and *Samuel Taylor*, the present overseers of the poor of the same parish, do hereby require you to quit and deliver up possession, on the 24th day of *June* next, of all that messuage, tenement, or dwelling-house, with the yard, garden, hereditaments, and appurtenances to the same belonging, situate and being in *Church Hill Lane, Walthamstow* aforesaid, and now in your occupation. Dated this 24th of *December*, 1844.”

For the defendant it was objected, that this notice was defective, inasmuch as it did not state *to whom* the premises were to be delivered up: and that there was no demise in the declaration to which it could apply.

It was then contended, on behalf of the plaintiff, that

(a) See *Goodtitle d. King v. Doe d. Lyster, v. Goldwin*, 1 *Woodward*, 3 B. & Ald. 689.; *Gale & D.* 468.



no notice to quit was necessary, half a year's rent being in arrear, and no sufficient distress on the premises : as to this, however, the proof failed. Certain acts of waste committed by the defendant were then proved.

To obviate the infirmities of the other parts of the case, the lessors of the plaintiff then sought to rely on the demise by *James Pistor*. For this purpose, they put in an examined copy of the court-roll of the manor of *Walthamstow*, containing an admittance of one *William James Pistor* to certain tenements, parcel of the manor, on the 9th of *January*, 1822, "in trust for the poor of the parish of *Walthamstow*."

It was objected, for the defendant, that this copy was inadmissible for want of a stamp. (a) This objection, however, was overruled.

The evidence to identify the premises mentioned in this admittance with those which were the subject of this action, and also to identify the *William James Pistor* therein named with the *James Pistor*, the party demising, was extremely slight. The learned baron, however, submitted that question to the jury, who found that the premises were the same, and that the *William James Pistor* in the admittance, and the *James Pistor* in the declaration, were one and the same person. The learned baron thereupon allowed the declaration to be amended (b), notwithstanding the counsel for the defendant declined to admit the lease, entry, and ouster, in the declaration so amended. There was no application to amend the consent-rule.

It was insisted, on the part of the defendant, that, as against *Pistor*, there had been an adverse possession of more than twenty years ; and that, at all events, he had acquiesced in the holding by the defendant, and that

(a) See *Doe d. Cawthorn or Hawthorn v. Mee*, 4 B. & Ad. 617., 1 Nev. & M. 424.

(b) "*Dubitante meipso*," said his lordship in his report to the court.

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such holding could not be determined without a demand of possession.

A verdict was entered generally for the lessors of the plaintiff.

*Byles*, Serjt., in *Easter* term last, obtained a rule nisi to enter a verdict for the defendant, or a nonsuit, pursuant to the leave reserved, or for a new trial.

*Channell*, Serjt. (with whom was *Bovill*), now shewed cause. The instrument in question was a mere agreement for a future lease, and was therefore properly stamped with an agreement stamp. If it were held to be a lease, it would operate as a forfeiture of the lessors' estate, the licence of the lord of the manor being necessary: and that is a circumstance that will not be lost sight of in construing the instrument. In *Doe d. Coore v. Clare (a)*, an instrument on an agreement stamp, reciting that *A.*, in case he should be entitled to certain premises on the death of *B.*, would immediately demise the same to *C.*, declaring that *he did thereby agree to demise and let the same*, with a subsequent covenant to procure a licence to let from the lord, — was held to operate as an agreement for a lease, and not as an absolute demise. Lord *Kenyon* said that all the court were of opinion "that the instrument was an executory agreement only, and not a lease:" and one of the reasons assigned was — "because, if this were held to be a lease, a forfeiture would be incurred; whereas, that would be contrary to the intent of the parties, who have cautiously guarded against it by the insertion of a covenant that a licence to lease should be procured from the lord." [*Tindal*, C. J. That was an agreement for a lease for twenty-one years. Does the same

(a) 2 T. R. 739.



rule hold with reference to a lease for a year? *Maulc, J.* The proviso as to the distress seems to shew that the actual position of the parties was intended to be the same as if the instrument was a lease.] The construction of the instrument can hardly depend upon that. In *Hayward v. Haswell* (a), by agreement between *P.* and *H.*, *P.* agreed to grant to *H.* a lease of land and the buildings then standing thereon, and others to be erected thereon under the agreement, with the appurtenances, as they were and had been in the possession of *H.*, for a term of years, to commence at a day then past, at a specified rent, payable on days then to come; and *P.* agreed in four months to erect certain buildings on the land; and *H.* agreed to take the lease, and execute a counterpart, and, in the said four months, to erect certain buildings on the land: and it was agreed that the lease should be granted immediately after *P.* should obtain his lease of the said premises from *M.*, under the then subsisting agreement between *P.* and *M.*; and that the lease from *P.* to *M.* should contain like covenants, &c., to those in the lease from *M.* to *P.*, and such other covenants as were usual in such leases; and *H.* agreed to pay the rent, as if the lease from *P.* were already executed: if *H.* failed to pay such rent, or perform the agreement, the agreement was to be void so far as regarded the engagements of *P.*; and *P.* might retain, or re-enter upon, and dispose of, the premises: if *P.* failed to perform &c., he was to pay 500*l.* to *H.* as liquidated damages. It was held that the instrument did not amount to a present demise, inasmuch as *P.* appeared by the agreement to have *no present power to grant a lease*; and that, *H.* having entered, and made default in payment of rent, *P.* could not distrain. *Bicknell v. Hood* (b), however, approaches more

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(a) 6 *Ad. & E.* 265.(b) 5 *M. & W.* 104.



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nearly to the present case. By an instrument dated *December 13th, 1834*, *A.*, in consideration of the rents covenants, and agreements thereafter mentioned agreed to grant a lease to *B.*, his executors, &c., of certain premises, to hold the same for the term of two years and three quarters, wanting seven days, from the 25th of *December* then instant, yielding and paying a certain rent, payable quarterly, the first payment to be made on the 25th of *March* then next; which indenture should contain covenants on the part of *B.* to pay the rent, &c., and all such other covenants as were contained in a lease therein referred to; and *B.* agreed that he would, if and when requested so to do by *A.*, accept such lease; and that, *until such lease should have been granted as aforesaid, it should be lawful for A., his executors, &c., to distrain for all or any part of the rent which might become due from B., for or in respect of the premises thereby agreed to be demised, at any time after the execution of that agreement*: and it was held that the instrument operated as an agreement only, and not as an actual demise: and consequently that an agreement stamp was sufficient for it. *Parke, B.*, there says: "The general rule is, that, if there are any words shewing a present intention that one is to give and the other to have possession, a tenancy is created; and the question is, whether in this case there appear sufficient words of positive agreement that the defendant shall have possession at all events. I think it will be found, on examination, that there is nothing to bind the lessor to give possession in any event, unless a lease is executed and I think the true construction of the instrument is that the lessor agrees to grant a future lease, and the lessee agrees, that, if, before it is granted, he is permitted to occupy, and does occupy, then the lessor shall have power to distrain. But for such a stipulation the lessor might not have been enabled to distrain."



some rent had been paid, without a fresh agreement to shew that the terms of the tenancy were settled." And *Maule, J.*, added : " There would be no doubt in this case, if it were not for the clause relating to the power of distress. But, if the intention of the whole instrument were that it should operate as a present demise, that clause would be idle, because the lessor would have had power to distrain without it. I think, therefore, the very clause appealed to confirms the view taken by the court, that this is not a lease, but an agreement only." The principle of that case is confirmed by *Hope v. Booth*. (a) The question is, whether the relation of landlord and tenant was created at the moment the agreement was executed. If not, the payment of rent under a distress would not create a tenancy.

The multiplicity of demises in this declaration was occasioned by a doubt, which, from recent cases (b), appears to have been well founded, whether the statute 59 G. 3. c. 12. s. 17. applies to copyholds.

The first demise is laid in the names of the persons who filled the offices of churchwardens and overseers of the parish of *St. Mary, Walthamstow*, at the date of that demise; the second, in the name of the supposed legal owner of the copyhold interest; the third, in the names of those who were churchwardens at the date of the agreement under which the defendant entered; and the fourth, in the names of those who were churchwardens at the time the notice to quit was given.

The amendment made at the trial in the second demise by altering the Christian name of the lessor of the plaintiff, was clearly warranted by the statute (c): *Doe*

(a) 1 B. & Ad. 498.

(b) See *Allason v. Stark*, 9 Ad. & E. 255., 1 P. & D. 183., *Gouldworth v. Knights*, 11 M.

& W. 342.; *In re Paddington Charities*, 9 Simons, 629.

(c) 3 & 4 W. 4. c. 42. s. 23.

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d. *Edwards v. Leach* (a); *Doe d. Simpson v. Hall*. (b) [Maule, J. The declaration states a written instrument—a lease from *James Pistor* to *John Doe*: the proof offered is, of a lease from *William James Pistor*. That clearly is a variance that was amendable. I think, however, the third demise is the only one upon which you can rely.]

The defendant was let into possession by *Webber* and *Budd*, the then churchwardens. He could not dispute their title. (c) And his tenancy—a tenancy from year to year upon the terms of that agreement—was properly put an end to by the notice to quit given on the 24th of *December*, 1844. The validity of that notice is not at all affected by the circumstance of the agents by whom it was given, professing to act also as agents for the then churchwardens and overseers, who were no parties to the original agreement. It might have been objectionable, had the premises been described in the notice as being held *under* the several persons named.

*Byles*, Serjt., in support of the rule. Assuming the instrument in question to be a mere agreement for a lease, it appears upon the face of it that the churchwardens were dealing with property in which they might have an equitable, but in which they clearly had no legal, interest; and that they were dealing with it as property held by them in their official, and not in their personal, capacities. They contract to procure a lease to be granted by the person having the legal interest. Under this contract, *Foster* never became tenant to *Webber* and *Budd*. [Tindal, C. J. Having been let into possession by *Webber* and *Budd*, is it competent to him to deny their title? (d)] The notice does not state to whom the posses-

(a) 3 *M. & G.* 229., 3 *Scott*,  
*N. R.* 509.

(b) 13 *Law Journ.*, *N. S.*,  
*Q. B.* 251.

(c) But he might shew that

title to be at an end, *vide Doe d.*  
*Jackson v. Ramsbotham*, 3 *M.*  
& *S.* 416.

(d) *Vide* 4 *N. & M.* 29. m.



ion is required to be delivered up. [*Maule, J.* Let the defendant walk out: no doubt the right parties will take possession.] Then, the instrument of the 23rd of June, 1842, is a demise, and not a mere agreement. *Pincro v. Judson* (a) comes the nearest to this of any of the reported cases. It was there held that an agreement for a lease, with stipulations for the lessee to commence with laying out a considerable sum on the premises (the lease to contain certain specified covenants), "and in the mean time, and until such lease shall be executed, to pay rent, and to hold the same premises, subject to the covenants above mentioned" — amounted to an actual demise. In *Bacon's Abridgment* (b), it is said: "It may be laid down for a rule, that, whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it, for such a determinate time, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years, as effectually as if the most proper and pertinent words had been made use of for that purpose: and, on the contrary, if the most proper and authentic form of words whereby to describe and pass a present lease for years, are made use of, yet, if, upon the whole deed, there appears no such intent, but that they are only preparatory and relative to a future lease to be made, the law will rather do violence to the words than break through the intent of the parties: for, a lease for years being no other than a contract for the possession and profits of the lands on the one side, and a recompense of rent or other income on the other, if the words made use of are sufficient to prove such a contract, in what form soever they are introduced, or however

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(a) 6 Bingham. 206., 3 M. & W. 497. See 15 M. & W. 601. (b) Tit. Leases and Terms for Years, (K).



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variously applicable, the law calls in the intent of the parties, and models and governs the intent accordingly." The last clause shews clearly that these parties were contemplating an actual present demise. It provides, that, "until such lease and counterpart shall be granted, the said yearly rent shall be payable and recoverable, by distress or otherwise, in like manner as if such lease and counterpart had been executed." [*Tindal*, C. J. It was uncertain at the time who would be the lessor; therefore it was agreed that in the meantime things should go on as if the defendant was tenant to *Webber* and *Budd*.] There is no authority to justify the construction of this instrument otherwise than as a demise.

TINDAL, C. J. I am of opinion that the plaintiff is entitled to recover upon the third demise. I am also of opinion that the memorandum of the 23rd of *June*, 1842, was an agreement only; and therefore there is an end to the question as to the sufficiency of the stamp. The present instrument differs materially from that produced in *Pinero v. Judson*. There, the defendant was to lay out money upon the premises, and to pay rent, and to hold, until the lease should be executed, "subject to the covenants above mentioned." A more formal lease was to be executed when circumstances required it. Here, however, the parties were evidently doubting who should be the real lessor; and in the meantime, until that point could be settled, the holding was to be under the subordinate agreement. To whom was the defendant to pay rent? To the persons who let him into possession: and, although in the agreement they are called "the churchwardens of the parish of *St. Mary, Walthamston*," it was well known who they were. Those persons having let the defendant into possession, the right, inas-  
much as they could not claim the premises as a corporation, never shifted from them; and, when they gave the defendant a notice to quit, he was bound to obey it.



Having come into possession under them, it was not competent to him to dispute their title.

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COLTMAN, J. I also think the demise by *Webber* and *Budd* may be sustained. The instrument in question was clearly an agreement, and no lease. If a lease, it must have been a lease for twenty-one years; which would have created a forfeiture of the estate. The parties evidently did not mean that. They all knew the difficulty of making a valid lease: and therefore it was understood that the defendant should, in the meantime, be let in as tenant upon the terms of the agreement, during so long a time as might be mutually agreed, that is, until the tenancy should be put an end to by a notice to quit. It has been suggested that the title of *Webber* and *Budd* is gone. That, however, is not so: whatever title they had, they still have, the property not passing to their successors in office as a corporation. Their title, by estoppel against the defendant, is as good as ever it was. I therefore think *Webber* and *Budd* were entitled to determine the defendant's holding by a notice to quit, and that they have so done.

MAULE, J. I also think the demise by *Webber* and *Budd* was proved. The agreement purports to be made by one *Gadsden*, as agent for and on behalf of the churchwardens of the parish of *St. Mary, Walthamstow* (not naming them), of the one part, and *Foster*, of the other part: and it is agreed (provided a licence can be obtained from the lord of the manor, and upon *Foster* putting the premises into good repair,) that the churchwardens shall grant a lease to *Foster* for twenty-one years from *Midsummer Day* then next, under the clear yearly rent of 30*l.*; such lease to contain covenants for payment of rent and taxes, and to repair, insure, not to commit waste, &c., and all other usual and proper covenants, &c.; and *Foster* agrees to accept such lease,



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and execute a counterpart, &c.; and that, until such lease and counterpart shall be granted, the said yearly rent shall be payable and recoverable, by distress or otherwise, in like manner as if such lease and counterpart had been executed. The introduction of these latter words clearly shews that the parties did not intend the instrument to operate as a lease. The uncertainty also of who might turn out to be the real landlord, affords another reason for thus construing it. *Pinero v. Judson* was a totally different case. There, the parties intended that the instrument they were executing should be a lease. I think a tenancy from year to year was created between *Foster* and the persons who let him into possession; and that such tenancy was sufficiently put an end to by the notice to quit, notwithstanding the mention therein of the present churchwardens and overseers. And, if this were not a tenancy from year to year, but a tenancy at will or at sufferance (a), the relation was sufficiently ended by the notice.

CRESSWELL, J. I am of the same opinion, though free to admit that I have had some difficulty in coming to that conclusion. The instrument in question is not a lease: clearly not a lease for twenty-one years. A lease was to be granted upon the performance of certain conditions precedent — the consent of the lord of the manor being obtained, and the repairs being done by the defendant. Upon the proper construction of the instrument itself, and the intention of the parties, it clearly is only an agreement for a lease. It appears that the defendant got into possession under certain persons who are called churchwardens of the parish. The circumstance of their not being named, is of no importance: *Francis v. Doe d. Harvey*. (b) He comes in under those persons, either as tenant from year to

(a) *Post*, 229. (b)

(b) 4 *M. & W.* 331.



year, or at sufferance: and, coming in under them, he is estopped from denying their title: *Doe d. Johnson v. Baytup or Baytrup*. (a) Supposing it to be a tenancy from year to year, there is no proof of a tenancy under any but the persons who let the defendant in; no proof that their title, whatever it might be, had expired. The doctrine of estoppel clearly applies, whether the tenancy was from year to year, or at will or sufferance (b): in the one case, there was a sufficient demand of possession; in the other, a sufficient notice to quit.

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Rule discharged. (c)

(a) 3 A. & E. 188. 4 N. & M. 837. See 4 N. & M. 29. n.

(b) "There is a great diversity between a tenant *at will* and a tenant *at sufferance*; for tenant *at will* is always by right, and tenant *at sufferance* entereth by a lawful lease, and holdeth over by wrong." Co.

*Litt.* 57. b. There seems to have been no tenancy at sufferance here.

(c) *Quære*, whether the memorandum itself did not create an immediate tenancy from year to year, convertible, by the execution of the lease, into a term for twenty-one years?

### PIGGOT v. The EASTERN COUNTIES Railway Company.

June 2.

CASE. The declaration stated, that the plaintiff was lawfully possessed of a certain cart-lodge of great value, to wit, of the value of 100*l.*, then standing upon ing and conducting an engine, that certain premises of the plaintiff adjoining the line, were destroyed by fire emitted from the engine, evidence is admissible for the purpose of shewing that other engines belonging to the company, upon other occasions, in passing along the line, threw sparks or ignited matter to a sufficient distance to reach the building in question — without shewing the precise circumstances under which this occurred.

The fact of premises being fired by sparks emitted from a passing engine, is *prima facie* evidence of negligence on the part of the company, rendering it incumbent on them to shew that some precautions had been adopted by them, reasonably calculated to prevent such accidents.



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certain land of the plaintiff, situate in the parish of *Boreham*, in the county of *Essex*, and near to a certain railway there then used by the defendants for the purpose of driving and propelling, from time to time, in and along the same, certain steam-carriages and steam-engines, containing fire and igneous matter, to wit, in the parish aforesaid, &c.; that the defendants were also then, to wit, on &c., in &c. aforesaid, possessed of a certain steam-carriage and steam-engine, containing fire and igneous matter, which was then driven and propelled in and along the said railway, near to the said cart-lodge of the plaintiff, and was then under the care and management of the defendants, who were then and there managing and conducting the same; yet that the defendants then and there so carelessly, negligently, and unskilfully managed and conducted their said steam-carriage and steam-engine, and the said fire and igneous matter then therein contained as aforesaid, and used and applied so little care, precaution, and skill, in and about the keeping, holding, and retaining of the said fire and igneous matter in and upon the said steam-carriage and steam-engine, and in and about the providing, applying, and using the fit, proper, and necessary means and appliances for keeping, holding, and retaining the said fire and igneous matter in and upon the said steam-carriage and steam-engine, and in and about the guarding, hindering, and preventing the said fire and igneous matter from escaping, passing, and flying from and out of the said steam-carriage and steam-engine, that, by and through the carelessness, negligence, unskilfulness, and improper conduct of the defendants in that behalf, and by and through the want of care, precaution, and skill of and in the defendants, in and about the keeping, holding, and retaining the said fire and igneous matter in and upon the said



steam-carriage and steam-engine, and in and about the providing, applying, and using the fit, proper, and necessary means and appliances for keeping, holding, and retaining the said fire and igneous matter in and upon the said steam-carriage and steam-engine, and in and about the guarding, hindering, and preventing the said fire and igneous matter from escaping, passing, and flying from and out of the said steam-carriage and steam-engine, divers sparks and particles of the said fire, and divers portions of the said igneous matter, then and there escaped, passed, and flew from and out of the said steam-carriage and steam-engine of the defendants, in and upon the said cart-lodge of the plaintiff; and that, by means thereof, the said cart-lodge, then being of the value aforesaid, then became ignited and set on fire, and was thereupon, and by means of the premises, then and there wholly burnt, consumed, and destroyed; and, by means of the premises aforesaid, ten stables, ten cow-houses, ten pig-sties, ten granaries, ten other cart-lodges, ten other sheds, and ten other outbuildings of the plaintiff, then being of great value, to wit, of the value of 1000*l.*, and also divers goods and chattels, to wit, one hundred yards of palings, one hundred yards of fences, twenty gates, &c., of the plaintiff, then being of great value, to wit, of the value of 500*l.*, and then respectively being in and upon and contiguous to the first-mentioned cart-lodge, then and there became ignited and set on fire, and were thereupon and by means of the premises then and there wholly burnt, consumed, and destroyed; and also, by means of the premises aforesaid, the plaintiff was then and there forced and obliged to pay, lay out, and expend divers sums of money, in the whole amounting to a large sum of money, to wit, 100*l.*, in and about the extinguishing and putting out of the said fire which so

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burnt, consumed, and destroyed the said cart-lodge goods, and chattels; and also, by means of the premises, the defendant had paid, laid out, and expended divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of 1000*l.* in and about the hiring, providing, erecting, and procuring temporary stables, &c. &c. goods and chattels necessary for temporarily replacing the several premises so burnt, consumed, and destroyed as thereinbefore mentioned, in order to enable the plaintiff to carry on and conduct his lawful and necessary affairs by him to be carried on and conducted; and also, by means of the premises, the plaintiff had been greatly hindered and prevented from carrying on and conducting his said affairs and business; to the plaintiff's damage of 2000*l.*, &c.

The defendants pleaded, not guilty.

The cause was tried before *Alderson*, B., at the last assizes for the county of *Essex*, when the following facts appeared in evidence:— The plaintiff was the occupier of a farm called *Porter's* farm, abutting upon the *Eastern Counties* Railway, in the parish of *Boreham*, about midway between *Witham* and *Chelmsford*. On the 27th of *August* last, between the hours of twelve and one, at noon, the thatch of a cart-lodge or shed in the plaintiff's farm-yard, distant about forty-five feet from the nearest line of rails, was, immediately after the passing of the mail-train from *London* to *Colchester*, observed to be on fire; and, notwithstanding every exertion, on the part of the plaintiff and those in his employ, to extinguish it, the fire communicated with several other farm-buildings and farming implements, and totally destroyed them. At the time of the accident there was a strong wind blowing from the direction of the railway towards the plaintiff's premises; and the



train was proceeding at an ordinary speed, viz. twenty-five miles an hour.

In order to shew that the fire was probably caused by sparks or particles of ignited coke emitted from the funnel or chimney, or from the fire-box of the engine by which the train was being propelled, the plaintiff's counsel proposed to ask a witness whether he had not on other occasions observed sparks or ignited matter to proceed from engines of the defendants passing along the line adjoining the plaintiff's farm.

It was objected, on the part of the defendants, that this was not a proper question, inasmuch as it was not competent to the plaintiff in this case to prove the emission of sparks or ignited matter from other engines, passing the spot on other occasions, without shewing them to have been under the care of the same driver, driven at the same speed, with the same number of carriages and passengers, and of the same construction as the engine in use at the time of the accident.

On the part of the plaintiff, the case of *Aldridge v. The Great Western Railway Company* (a) was relied on

(a) 3 M. & G. 515., 4 Scott, N. R. 156., 1 Dowl. N. S. 247. That was an action upon the case against a railway company, for so carelessly and improperly managing and directing an engine on their railway, by their servants, that sparks flew from the engine upon a stack of beans standing in an adjoining field, belonging to the plaintiff, whereby the stack was destroyed. A case stated for the opinion of the court, under the statute 3 & 4 W. 4. c. 42. s. 25., alleged that the engines used upon the railway were such as were usually

employed on railways for the purpose of propelling the trains and carriages thereon, and that the engine from which the sparks that set fire to the stack in question flew, was used at the time in the ordinary manner, and for purposes authorised by the act of parliament incorporating the company. And the court of Common Pleas held, that the facts stated were not sufficient to enable them to infer negligence on the part of the company, so as to justify the directing of the entry of a verdict for the plaintiff; but that they did not

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as an authority that evidence was admissible to shew that the engines in use upon this railway were so constructed, and generally so used, as to emit sparks,—for the purpose of establishing a case of negligence against the company.

The learned baron being of opinion that the question might properly be put, the witness stated, that he had frequently seen pieces of ignited coke fall from the lower part of the engine (the fire-box), but not from the chimney, the day-light rendering it difficult, if not impossible, to see sparks issuing thence. Other witnesses also proved that they had frequently seen sparks and small particles of coke, about the size of a hazle nut or a walnut, proceed from the chimneys of the company's engines when passing along the line at dark, and fall in an ignited state on to the plaintiff's premises, near the buildings in question; and that it sometimes happened that pieces of ignited coke falling from the fire-box on to the driving wheels of the engine, were thrown by them to a considerable distance.

Professor *Farey*, and other persons practically acquainted with the construction and the working of the engines generally in use on railways, stated, that the emission of sparks or particles of ignited matter from

shew such an *absence* of negligence as to warrant the directing of the entry of a nonsuit. The special case was thereupon withdrawn, in order that the parties might go on to trial.

In the course of the argument, it was contended, for the plaintiff, that the facts shewed the defendants to have been guilty of negligence; for, that, as it appeared that the engine was liable to emit sparks, they were bound to take care that

such sparks did no harm. *Tindal*, C. J., thereupon observed: "If the case had gone to trial, and the plaintiff had proved that the engines had frequently set fire to stacks, that would have shewn negligence; but it does not appear that such an accident had ever happened before." And *Mauk*, J., added: "The case does not state that sparks had ever previously come from the engine."



the top of the chimney might, in a great measure, be prevented by a cap or covering of wirework, or by the insertion of a perforated metal plate placed horizontally at the chord of the arch of the smoke-box, so as to intercept the particles escaping through the smoke-tubes — certain tubes that are placed in the lower part of the engine, between the fire-box and the smoke-box, the inside diameter of which tubes was described to be about an inch and a half—though it was admitted, that this would, to a certain extent, impede the draft, and, consequently, diminish the power of the engine. They, however, stated, that this might be remedied, or the emission of sparks altogether prevented, by employing engines of such power that they need not be worked to their utmost capacity. They also stated, that, in their judgment, to produce the injury here complained of, the engine used on the occasion in question must have been worked to its utmost; and that the danger arising from the emission of sparks might be entirely prevented by shutting off the steam on passing a spot where danger was to be apprehended.

On the part of the defendants, the driver and fireman who had charge of the engine at the time of the accident, and other persons, were called to prove that the engines of the company were of the best construction, and of adequate power; and that, on the occasion in question, all practicable care had been taken to prevent accidents from fire; the driver and fireman stating, that, in passing the plaintiff's farm, the steam had been shut off, there being a considerable incline (about 1 in 330) at that spot, as well as a sharp curve, and a pair of points at the lower part, in passing which, more than ordinary attention and care were requisite. They also condemned the use of caps and perforated plates, as operating injuriously upon the working of the engine, by

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preventing the free escape of the waste steam, and thereby diminishing the draft.

The learned baron, in leaving the case to the jury, told them, that the company, in the working of their engines, were bound to use all reasonable means to prevent accidents, and not to tax them beyond their power; and that the emission of ignited particles in the way described by the plaintiff's witnesses, was some evidence that the engine in question was overworked.

The jury returned a verdict for the plaintiff. The amount of damages was referred.

April 17.

*Shee*, Serjt., having, in *Easter* term last, obtained a rule nisi for a new trial, on the grounds that the answer to the question objected to at the trial was improperly received, and that the verdict was against the weight of evidence—the learned judge reported to the court, that he held the evidence admissible for the purpose of ascertaining whether or not sparks or ignited particles of coke could be thrown to so great a distance from the line as the spot in question.

*Channell*, Serjt. (with whom was *Bovill*), now shewed cause. The declaration charges negligence in the largest and most comprehensive form, whether in the management of the engine or in its construction or quality. It clearly was competent to the plaintiff to shew, by such means as were within his power, the nature and character of the engines in general use upon the defendants' line, the better to enable the scientific witnesses to state whether or not the injury complained of could have been caused in the way suggested, or whether some precautionary measures might not have been adopted to insure the safety of property traversed by their railway. The evidence was offered, not for the purpose of shewing, as a fact, that the plaintiff's pre-



mises were fired by a spark from the particular engine, but merely to shew that the engines in use by the defendants habitually emitted sparks in a manner likely to cause such an injury. And the testimony of Professor *Perry*, and the witnesses who followed him, clearly established the fact, that, if the engine in question had been well constructed, and was in efficient working order, it must on this occasion have been taxed beyond its power; and that some one of the precautions suggested, *viz.* the cap on the chimney, the perforated plate in the smoke-box, or shutting off the steam on approaching a place where danger was to be apprehended, might have prevented the destruction of the plaintiff's property. The charge of negligence involves knowledge on the defendants' part of the defective construction or condition, or the improper driving of their engines. If sparks were frequently seen projected to a great distance on either side of the line, surely that is a circumstance which the jury are to take into their consideration in ascertaining the existence or the absence of negligence. In *Webb v. Smith (a)*, which was an action for bribery at a borough election, the course of proceeding was proved to have been as follows:—The defendant, standing in a front room of a certain house, received the voters there, and gave a card to all those to whom he considered it expedient to offer a bribe; with that card the voters were directed to an inner room, which was partially darkened, and in which another man, a stranger to the borough, was sitting at a table; to that person the voters presented their cards, and in return for each card a small parcel, containing 10*l.*, was placed on the table. It was further proved that all the voters who took such parcels away with them voted for the particular candidate. Evidence was also received, after ob-

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(a) 4 *N. C.* 373., 6 *Scott*, 147.



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jection, which was overruled, of the defendant's having, in the course of the same day, and at the same place, given cards to other voters besides those named in the declaration, and that such voters also went into the inner room, received their 10*l.*, and voted for the same candidate. Upon a motion for a new trial, on the ground that this evidence was improperly admitted, *Tindal*, C. J., said: "I am of opinion that such evidence was properly received, to shew that *Smith* was cognizant of the proceedings in the inner room. It was a link in the chain of proof, which tended to establish his guilty knowledge." And the rest of the court concurred in refusing a rule upon that point. In the case of a prosecution for forgery, evidence of what the prisoner did at other times and in other places, is admissible for the purpose of ascertaining the intent: and such evidence is clearly admissible to shew knowledge, where knowledge is material. [*Tindal*, C. J. The evidence now in question was admissible for the purpose for which the learned judge reports to us that he received it, *viz.* to ascertain whether or not sparks, such as those described, *could* be emitted from the engines used by the company, to the distance represented. *Maule*, J. It clearly proved the possibility of such a thing happening; and for that purpose it was admissible.]

The verdict was fully warranted by the evidence. It was abundantly shewn that no precautions whatever had been taken by the company to mitigate or avert the danger arising from their mode of working their engines. It was shewn that engines of adequate power, moderately worked, would be comparatively harmless. There was enough to justify the conclusion, either that the defendants' engine was insufficient, or that it was overworked; in either of which cases the defendants would in point of law be guilty of negligence.



*Stee*, Serjt. (with whom was *Lush*), in support of the rule. The declaration is in the common form, imputing negligence and want of due care on the part of the driver of the engine on the particular occasion: there is no complaint of imperfect construction of the defendants' engines generally. [*Maule*, J. The charge is, that the company omitted to do that which they were in law bound to do, *viz.* so to use their engines as not to injure the property or the rights of their neighbours. It is quite indifferent to the plaintiff what may have been their negligence on other occasions than that in question.] Using engines of the best and most approved construction, and of a power adequate to the work imposed upon them, the defendants have used all reasonable and practicable care to prevent damage being done by them to property situate near the line; and consequently they are not liable. The evidence shewed that the engines of the defendants are similar to those in use on nearly all the other railways: and the result of it is, that the cap, or the perforated plate, spoken of by some of the plaintiff's witnesses as a means of preventing the emission of sparks, is virtually impracticable; and that the greatest possible care will not at all times prevent accidents of this sort. [*Maule*, J. The evidence, I think, shews that it is perfectly practicable to adopt precautions that will render such accidents next to impossible — by travelling at a rate of speed, or with a load, proportioned to the power of the engine.] The evidence that was objected to was clearly inadmissible, and tended most materially to mislead the jury. It was offered for the purpose of shewing, that, on other occasions, other engines belonging to the company — not proved to have been of the same power or the same construction, or driven by the same person, or at the same rate of speed, or drawing the same weight — had been seen to emit sparks. Surely that was not

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relevant to the issue, or matter upon which the jury could safely act in considering whether or not the defendants had been guilty of the particular negligence here charged against them. In the case referred to in *Webb v. Smith*, the evidence objected to was part of a very transaction complained of: it was not, as *Baquet, J.*, observes, like shewing that the party "bribed some other voter, at some other place."

TINDAL, C. J. I am of opinion that this rule should be discharged. The defendants are a company entrusted by the legislature with an agent of an extremely dangerous and unruly character, for their own private and particular advantage: and the law requires of them that they shall, in the exercise of the rights and powers so conferred upon them, adopt such precautions as may reasonably prevent damage to the property of third persons through or near which the railway passes. The evidence in this case was abundantly sufficient to shew that the injury of which the plaintiff complains was caused by the emission of sparks, or particles of ignited coke, coming from one of the defendants' engines; and there was no proof of any precaution adopted by the company to avoid such a mischance. I therefore think the jury came to a right conclusion, in finding that the company were guilty of negligence, and that the injury complained of was the result of such negligence. There are many old authorities to sustain this view; for instance, the case of *Mitchil v. Alestree* (a), for an injury resulting to a plaintiff from the defendant's riding an unruly horse in *Lincoln's Inn Fields*; that of *Bayntine v. Sharp* (b), for permitting a mad bull to be at large; and that of *S*

(a) 1 Vent. 295.

(b) 1 Lutw. 90.



*v. Pelah (a)*, for allowing a dog, known to be accustomed to bite, to go about unmuzzled. The precautions suggested by the witnesses called for the plaintiff in this case, may be compared to the muzzle in the case last referred to. The case of *Beaulieu v. Finglam*, in the Year Books (*b*), comes very near to this. There, the defendant was charged, in case, for so negligently keeping his fire as to occasion the destruction of the plaintiff's property adjoining. The duty there alleged was — "*quare, cum secundum legem et consuetudinem regni nostri Angliæ, hactenus obtentam, quod quilibet de eodem regno ignem suum salvò et securè custodiat, et custodire teneatur, ne per ignem suum dampnum aliquod vicinis suis eveniat :*" and there was no suggestion that it was necessary to define the particular sort of negligence that was complained of. And, with respect to the evidence that was objected to, I think it clearly was admissible for the purpose for which it was received, *viz.* to ascertain the possibility of fire being projected from the engine to such a distance from the railway as the building in question. Whether or not it was admissible for any other purpose, it is unnecessary to inquire.

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COLTMAN, J. I am of the same opinion. It appears, from the report of the learned judge, that the evidence in question was admitted, not for the purpose of shewing a general habit of negligence on the part of the company, but to shew that the injury *might* have been caused in the way suggested. It appears to me that the jury might reasonably infer that the fire was occasioned by sparks from the engine, and that the fact of the buildings being fired by sparks emitted from the defendants' engine, established a *primâ facie* case of negligence, which called upon them to shew that they had adopted some

(a) 2 *Stra.* 1264.

(b) *P. 2 H.* 4, fo. 18, pl. 5; *antè*, Vol. II. p. 889.



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precautions to guard against such accidents. None, however, appeared to have been attempted.

MAULE, J. I also am of opinion that this rule should be discharged. It was obtained on two grounds — first that certain evidence was improperly received at the trial — secondly, that the evidence did not warrant the verdict. The evidence objected to was, that other engines used on the defendants' line, of the same description as that which was said to have caused the injury here, had on various other occasions been seen to throw particles of ignited matter to a distance from the line as great or greater than the spot in question. The matter in issue was, whether or not the plaintiff's property had been destroyed by fire proceeding from the defendant engine: and involved in that issue was the question whether or not the fire *could* have been so caused. The evidence was offered for the purpose of shewing that it could: and for that purpose it was clearly material, and admissible. As to the other point, it appears that the plaintiff was possessed of certain farm-buildings adjoining the railway, and that, in consequence of the sort of management adopted by the company, fire was thrown from a passing engine upon those buildings, and destroyed them. I am far from saying that it is impossible that this could have occurred without negligence on the part of the company. But it at least affords a strong presumption of negligence, in the absence of evidence to shew that something had been done by the company to lessen the chances of danger. It appeared that no steps of that sort had been taken, and that the company might have in a great measure prevented the emission of ignited matter, by using guards of wire, or perforated plates, as suggested by Professor Farey, or by employing engines of larger power. Upon the whole, I think the verdict would have been wrong had it been the other way.



CRESWELL, J. I am entirely of the same opinion,  
upon both points.

Rule discharged.

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### TINNISWOOD v. PATTISON.

June 3.

**FALSE** judgment, from the county-court of *York*.

It appeared, from the schedule annexed to the sheriff's return, that the suit in the county-court was a replevin by *Pattison* against *Tinniswood*, for taking and unjustly detaining his cattle, goods, and chattels, to wit, &c.

The defendant below, as bailiff of the mayor, aldermen, and citizens of the city of *York*, well acknowledged the taking of the said cattle, goods, and chattels of the plaintiff in the declaration mentioned, in the said place in which &c., and justly &c., because he said that the said place in which &c. then was, and at the said time when &c. was, the close, soil, and freehold of the said mayor, &c., and because the said cattle, at the said time when &c., were in the said place in which &c., eating up the grass there then growing, and doing damage there to the said mayor, &c., he, the defendant, as the bailiff of the said mayor, &c., and by their command in this behalf, well acknowledged the taking of the said goods, cattle, and chattels in the declaration mentioned, in the said place in which &c., and justly &c., as and for and in the name of a distress for the said damage so then

The jurisdiction of the county-court is ousted by a plea or cognisance setting up a title to the freehold, although no issue be taken on that part of the plea or cognisance.

Where, therefore, the defendant in replevin made cognisance as bailiff of *A.*, alleging that the *locus in quo* was the freehold of *A.*, and that he, as bailiff, took the cattle &c. damage feasant; and the plaintiff pleaded that the defendant was not the

bailiff of *A.*, and did not, as such bailiff, take the cattle, &c; and issue was joined on this plea: — Held, that the subsequent proceedings in the county-court were *coram non judice*, and void.



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there done and doing as aforesaid—verification, and prayer of judgment and of a return of the said cattle, goods, and chattels.

The plaintiff below pleaded in bar that he, by reason of any thing in the cognisance of the defendant (below) filed in this cause, ought not to be barred from maintaining the action, because he, the plaintiff (below), said that the defendant (below), at the said time when &c., was not the bailiff of the mayor, &c., of the city of *York*, and did not, as the bailiff of the said mayor, &c., and by the command in this behalf, take the said cattle, goods, and chattels in the declaration mentioned, in the said place in which &c., in manner and form as in the said cognisance is alleged—concluding to the country.

Upon this plea issue was joined, and upon the trial the jury (a) found that the defendant below was not the bailiff of the mayor, &c., of the city of *York*, and did not, as bailiff of the said mayor, &c., and by their command take the said cattle, goods, and chattels in the declaration mentioned in the said place &c., in manner and form as in the said cognisance alleged: and they assessed the damages of the plaintiff below, by reason of the taking and detaining the said cattle, goods, and chattels in the declaration mentioned, at the sum of 5*l.*, besides his costs and expenses by him in or about his suit in the behalf laid out and expended, and for those costs and charges to one shilling, &c.

The errors assigned were, amongst others, “that, the freehold of the said place in which &c. having been brought in question by the cognisance, the county-court of *Yorkshire* ceased to have jurisdiction to entertain the suit in the same court, and ought not further to have proceeded therein; that the plea in bar of the said *Jane Pattison*, and the issue joined between the said parties touches the freehold of the said place in which &c., and

(a) *Quære*, the “free-suitors;” *vide antè*, Vol. II. p. 861.



that, after such last-mentioned plea so pleaded, and issue joined, the county court ought not to have proceeded further in the same suit; that, upon the pleading of the said cognisance of the said *Thomas Tinniswood*, the county-court of *Yorkshire* was ousted of its jurisdiction over the suit, and ceased to have jurisdiction to proceed therein, and ought not to have proceeded further therein; and that it manifestly appears upon the face of the record aforesaid, that all the proceedings taken in the said court after the pleading of the said cognisance of the said *Thomas Tinniswood*, were illegal and irregular, and were had and taken contrary to law."

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*Allen*, Serjt. (with whom was *Rew*), for the plaintiff in error. (a) The title to the land upon which the distress was taken being put in issue by the plea, or, at all events, being so pleaded that it might have been put in issue, the jurisdiction of the court below was at an end. In *Comyns's Digest* (b), treating of the county-court, it is laid down, that "it cannot hold plea by plaint concerning freehold; and, therefore, if a man, in a plaint in replevin, justifies, avows, or makes cognisance as in the freehold of *B.*, the jurisdiction of the county court is ousted." Again: "If the county-court holds plea where it has no jurisdiction, the proceeding is *coram non judice*, and void, and trespass lies against any who act under the process of the court. And, if freehold, or other plea which ousts the jurisdiction, be pleaded, all the subsequent proceedings are void." The authority *Comyns* refers to is *Cannon v. Smalwood*. (c) There, in trespass for taking and impounding the

(a) The principal point marked for argument (and the only one argued), on the part of the plaintiff in error, was — "that the jurisdiction of the county-court was taken away by the cognisance, which in-

volved a question of title to land; and, consequently, that the plea in bar, and all subsequent proceedings, were erroneous and without authority."

(b) *Title County* (C. 8.)

(c) *3 Levinz*, 203.



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plaintiff's beasts until payment of 3*l.* 7*s.*, &c., the defendant pleaded, as to all besides the taking and impounding the beasts until payment of 3*l.* 2*s.* 2*d.*, not guilty, and as to that he pleaded a suit in the county-court, brought by *J. S.* against the now plaintiff, where the then defendant pleaded *liberum tenementum* in the earl of *Arundel*, and justified the taking damage feasant in the freehold of the earl; to which the then plaintiff pleaded in bar of the conusance that the earl was bound to repair the fences, and that for default of repair the beasts escaped; and on this issue was taken, that the fences were in good repair; and the jury found them out of repair; and the plaintiff had judgment; and that a precept issued thereon to the now defendant, being bailiff, under which he seized and impounded the beasts. Upon demurrer to this plea, it was objected, amongst other things, "que le judgment fuit void, *et coram non judice*, quia apres franktenement plead, le county-court n'ad jurisdiction, car franktenement ne peut estre try sans brief. A que fuit respond, que le franktenement ne fuit try la, mez rise sur collateral matter, scil. si les fences fueront en repair. Mes per cur. Per cet tryal un charge sur le franktenement est en question, et ils ne ont ascun poyer apres franktenement plead de proceeder en le cause ny directment, ny collateralment, et pur ceo les proceedings apres ceo plead fueront *coram non judice*, et void: et sur cest exception judgment fuit done pur le plaintiff." This authority is conclusive of the point. (a)

(a) The principle of the objection to the jurisdiction seems to be, that, if it continued, the inferior court would have to pronounce a judgment, not only upon the *verdict* found on the matter *in issue*, namely, the state of repair of the fences,

but also upon the *confessions* of the matter of *freehold*, of the nature of which matter the inferior court is presumed to be ignorant, and as to the effect of which confession, it is therefore *non judex*.



*Channell, Serjt., contra.* It may be conceded that the jurisdiction of the county-court is gone when the freehold comes in question. But it is denied that it does come in question here. [*Maule, J.* The question is, whether the jurisdiction of the county-court was not ousted as soon as the plea of *liberum tenementum* was pleaded.] All that was resolved in *Cannon v. Smalwood* was, that the freehold could not be *tried* without writ: and even that was *obiter dictum*, for, the subsequent pleadings there brought a charge upon the land; whereas the title to the freehold is not put in issue here. [*Tindal, C. J.* The plaintiff might have taken issue on soil and freehold. The authority referred to shews, that, if upon the pleadings the freehold *may* come in issue, the county-court must stay its hand.] In *Cannon v. Smalwood*, the result would necessarily bring a charge upon the land: but here it could not. [*Maule, J.* This is very analogous to the case of a prohibition to the ecclesiastical court.] That is granted only where the freehold is actually in issue. [*Tindal, C. J.* Where it *may* come in issue.] It cannot be said that the inferior jurisdiction in this case could by possibility be dealing with the freehold.

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*Allen, Serjt.*, was heard in reply.

TINDAL, C. J. I think our judgment must be for the plaintiff in error. The case of *Cannon v. Smalwood*, which has been brought before us, seems to me to be as nearly as possible in point with the present. There, the title to the freehold was not directly brought in issue. So, here, no issue is taken upon the allegation of soil and freehold in the mayor, aldermen, and citizens of York, but the issue is upon the collateral point whether the defendant below was bailiff of the mayor, &c., and took the cattle as such bailiff. I therefore



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think that case is a distinct authority to shew that a county-court has lost its jurisdiction in the matter that the plaintiff below should have proceeded by a Queen's writ of *replegiare facias*. Lord Coke's commentary on the statute of *Gloucester*, c. 8. (a), is corroborative of the correctness of this conclusion. Speaking of the jurisdiction of the sheriff in his court, he says: "Neither shall he hold plea of trespass for taking away of charters concerning inheritance in freehold, for, it is a maxim in law, '*quod placitum cernent' chart', seu script' liberum tenementum tale in aliquibus curiis quæ recordum non habent seculum legem et consuetudinem regni Angliæ, sine breve placitari non debent*:'" that is, that he shall not hold plea of trespass for taking away charters of inheritance because it concerns the freehold. (b) For these reasons I think the judgment of the court below was erroneous and must be reversed.

COLTMAN, J. I do not think the present case can be successfully distinguished from *Cannon v. Smalton*. The case suggested, of a prohibition to the ecclesiastical court, also appears to me to be very analogous.

MAULE, J. I also am of opinion that the judgment of the county-court must be reversed. If the writ had been demurred to, I think it would have been extremely difficult to say that the county-court was ousted of its jurisdiction. That in effect is this: for, on demurrer, the freehold in the mayor, aldermen and citizens of *York*, would have been admitted; and the effect would have been that the inferior court

(a) 2 *Inst.* 310, 311.

(b) An action of *detinue of charters* savours of the realty, and can properly be brought only in this court. *F. N. B.*

47. B. No objection to the jurisdiction of the court being chequer appears, howe-  
 have been taken in *St. v. Hockley*, 15 *M. & W.*



have had to deal with a matter with which they are not competent to deal. So, here, upon the issue taken, soil and freehold in the mayor, aldermen, and citizens of York is admitted.

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CRESSWELL, J. I am of the same opinion. The case of *Cannon v. Smalwood* is rather startling at first sight. But the passage cited by my lord, from 2 *Inst.*, shews that it is based on principle. And that case is a distinct authority that here the jurisdiction of the county-court was at an end the moment the title to the freehold was pleaded.

Judgment reversed.

### TEMPEST and Another v. KILNER.

June 4.

**ASSUMPSIT.** The declaration stated, that, on the 18th of *July*, 1844, the plaintiffs, at the request of the defendant, bargained and agreed to buy of the defendant, and the defendant then bargained and agreed to sell to the plaintiffs, a certain interest or share of him, the defendant, in a certain company or partnership undertaking, for constructing a railway from the parish of *Ashton-under-Lyne*, near *Manchester*, in the county of *Lancaster*, to the parish of *Kirkheaton*, near *Huddersfield*, in the county of *York*, to wit, 100 shares in the said company or partnership undertaking, at a certain price in that behalf, to wit, 15s. premium, for each and every share, that is to say, 15s. for each and every share, in addition to such sum or sums as at the time of the transfer by the defendant to the plaintiffs, should have

A contract for the sale of "shares" in a projected railway, is not within the statute of frauds.

Such a contract is satisfied by a tender of a "letter of allotment," where from the circumstances it may be inferred that the parties dealt upon the footing of such

document being equivalent to scrip: and, consequently, there may be a complete breach of such a contract before the actual existence of any "scrip" or "shares" properly so called.



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been paid to the said company or partnership in respect of the said shares and each of them; that, on &c. last aforesaid, in consideration thereof, and that the plaintiffs, at the request of the defendant, then promised the defendant to accept, *within a reasonable time*, a transfer of the said interest or shares, and to pay for the same at the rate or price aforesaid, the defendant then promised the plaintiffs, *within a reasonable time*, to transfer the said interest or shares to them the plaintiffs; that, although a reasonable time for the said transfer of the said interest or shares had long elapsed before the commencement of the suit, and the defendant, long before the commencement of the suit, and after a reasonable time from the making of the said agreement and promise had elapsed, could and might and ought to have transferred the same to the plaintiffs, upon payment of the price thereof after the rate aforesaid; and although the plaintiffs had always, from the said time of the making of the said agreement and promise, been ready and willing to accept the transfer of the said interest and shares of him the defendant, and to pay for the same at and after the rate in that behalf aforesaid, — whereof the defendant, during all the time aforesaid, had notice, — and although the plaintiffs, after the lapse of a reasonable time for the transfer of the said interest or shares of the defendant, to wit, on the 1st of *November*, 1844, requested the defendant to transfer the said interest or shares to them the plaintiffs, and then tendered and offered to pay for the same at and after the rate in that behalf aforesaid: yet the defendant did not nor would, when so requested as aforesaid, transfer, and had not up to that time transferred, to the plaintiffs the said interest or shares of him, the defendant, in the said company or partnership undertaking, but had neglected and refused so to do; and that, by reason thereof, the plaintiffs had lost divers great gains and profits which



might, and otherwise would, have accrued to them from the transfer of the said interest or shares to them as abovesaid, &c.

The defendant pleaded — first, non assumpsit — secondly, that the plaintiffs were not always, from the time of the making of the agreement and promise, ready and willing to accept the transfer of the said interest and shares of him the defendant, and to pay for the same at and after the rate in the declaration in that behalf mentioned, *modo et formâ* (a) — thirdly, that, before any breach of the promise, the plaintiffs discharged the defendant from performing the agreement, &c.

The cause was tried before *Patteson, J.*, at the last *York* assizes, when the facts appeared to be as follow: — On the 18th of *July*, 1844, the defendant contracted to sell to the plaintiffs 100 shares in a projected railway, to be called *The Huddersfield and Manchester Railway*, at a premium of 15s. per share. At the time of the contract the defendant had only a letter of allotment, entitling him to become a shareholder; there being no shares or scrip then in existence. On the 12th of *August*, the defendant refused to complete the contract. Scrip was issued in *October*. The act incorporating the company was not passed until the 21st of *July*, 1845.

On the part of the defendant, it was objected that the contract was void, being within the seventeenth section of the statute 29 *Car. 2. c. 3.*, inasmuch as the memorandum of the bargain did not disclose the price. In answer to this objection, the plaintiff's counsel referred to *Humble v. Mitchell* (b), where it was held that shares

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(a) To this plea there was a demurrer, upon which the plaintiffs, in *Michaelmas* term last, obtained judgment. *Vide ante*, Vol. II. p. 300.

(b) 11 *Ad. & E.* 205., 3 *P.* & *D.* 141. In *Knight v.*

*Barker*, 16 *M. & W.* 66., it was held, that an agreement for the sale of railway scrip, was not exempt from stamp duties, as a sale of goods, wares, or merchandise. And see *Bowlby v. Bell*, *post*, 284.



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in a joint-stock banking company are not goods, wares and merchandises, within the seventeenth section of the statute of frauds, nor an interest in land within the fourth section.

It was then insisted that the contract was not proved the contract declared on being for the sale of *share* whereas the document produced (the letter of allotment) shewed that there were none at that time in existence. To this it was answered, that it did not lie in the mouth of the defendant to contend that the things which he had contracted to sell as shares, were not strictly and properly so called.

A verdict was found for the plaintiffs, damages 150*l.* being the difference in value of the shares between the date of the contract and the day of issuing the scrip, leave being reserved to the defendant to move to enter a nonsuit, or to reduce the damages to 25*l.*, the difference in value between the date of the contract and the 12th of *August*, when the defendant first refused to complete the contract. (*a*)

*Byles*, Serjt., accordingly, in *Easter* term last, obtained a rule nisi.

*Talfourd*, Serjt. (with whom was *Cleasby*), now shewed cause. It was not competent to the defendant, who, at the time of entering into the contract, treated and dealt with the letters of allotment as “shares,” afterwards to turn round and insist that no such things as shares were then in existence. In the 7 & 8 *Vict. c. 110. s. 3.*, the act for the registration of joint-stock companies, the word “share” is adopted by the legislature as descriptive of an interest of this kind. [*Maule*, J. That pro-

(*a*) Leave was reserved to the plaintiffs to amend the declaration, if necessary, by substituting for “shares” the words “scrip, or representative of shares.”



vision has reference only to the sense in which particular words are used in that act: it does not purport to give a *general* signification to the words themselves. The question here is, whether the term "share" does not accurately describe the article the one party intended to buy and the other to sell.] Then, as to the damages — the jury have properly assessed the amount the plaintiffs are entitled to recover, provided the defendant's breach of contract took place only at the time when he first became enabled to perform his engagement, by delivering scrip, viz. in *October*, 1844.

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*Byles*, Serjt., in support of the rule, was not called upon by the court.

TINDAL, C. J. There was a complete breach of the contract when the defendant, on the 12th of *August*, declined to perform it. He was bound then to deliver the document with reference to which the parties were dealing. I think the plaintiffs are not entitled to damages beyond that day: they had no right to lie by until the concern became profitable. The rule must be made absolute to reduce the damages to 25%.

Held, that the vendee of shares in a projected railway, under a contract to be completed at a future day, may recover, as damages for the non-delivery, the difference between the price agreed on and the market-price of the day on which the sale should have been completed; but that he is

MAULE, J. I am of the same opinion. The contract was to be performed within a reasonable time from the 18th of *July*, by the delivery of that which the parties at that time mutually had in their contemplation. (a)

The rest of the court concurring,

Rule absolute accordingly.

not entitled to damages in respect of a further advance of price taking place afterwards at the time of the actual issuing of the scrip. (b)

(a) See *Mitchell v. Newhall*, 15 M. & W. 309.; *Lamert v. Heath*, ib. 486. *Johnson*, 2 East, 211.; *M'Arthur v. Lord Seaforth*, 5 Taunt. 257.; *Vaughan v. Wood*, 1

(b) Vide tamen *Shepherd v. Mylne & Keene*, 403.



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## THATCHER v. Sir RICHARD ENGLAND, Knt.

June 5.

The defendant, who had been robbed of jewellery, published an advertisement, headed "30*l.* reward," describing the articles stolen, and concluding thus: — "The above sum will be paid by the adjutant of the 41st regiment, on recovery of the property, and conviction of the offender, or in proportion to the amount recovered."

A., a soldier, on the 10th of June, informed his serjeant that B. had admitted to him that he was

the party who had committed the robbery, and the serjeant gave information to the police-station. On the 14th, the plaintiff, a police-constable, learning from one C. that B. was to be met with at a certain place, went there and apprehended him. The plaintiff, by his activity and perseverance, afterwards succeeded in tracing and recovering nearly the whole of the property, and in procuring evidence to convict B. : —

Held, that the plaintiff was not, but (per *Tindal*, C. J., and *Cresswell*, J.) that A. was, the party entitled to the reward.

THIS was an action of assumpsit tried before Coleridge, J., at the *Kent* summer assizes in 1844, when a verdict was found for the plaintiff, damages 2*l.* subject to the opinion of the court upon a special case, it being agreed that the court should have the same powers as a jury in drawing conclusions from the facts stated.

The declaration alleged, that, on the 26th of April 1844, certain goods and chattels, the property of the defendant, to wit, &c. &c., and which said goods and chattels were of great value, to wit, of the value 200*l.*, had been and were feloniously stolen from the officers' quarters of the infantry barracks at *Canterbury* in the county of *Kent*; that thereupon the defendant caused and procured a certain advertisement, hand-bill or placard to be printed and published, headed "30*l.* reward," whereby, after stating that the said goods and chattels had been so stolen as aforesaid, the defendant did promise and undertake that the said sum of 30*l.* should and would be paid by the adjutant of Her Majesty's 41st regiment, on recovery of the said property of the defendant, and conviction of the offender, or in proportion to the amount recovered, to such person as should cause the offender to be apprehended and convicted, and



*the said property to be recovered*: Averment, that the plaintiff did cause the said offender, to wit, one *William Warren*, to be apprehended for the said felony, and that the said *William Warren* was afterwards, and before the commencement of the suit, to wit, at the general sessions of the peace holden in the city and borough of *Canterbury*, on the 1st of *July*, 1844, aforesaid, in due course of law tried for the said felony, and was, upon the said trial, upon and by means of the evidence and information of the plaintiff, found guilty thereof, and duly sentenced to be punished according to law for his said offence, and the said property of the defendant so stolen as aforesaid was thereby then recovered by the defendant: Breach — that neither the adjutant of the said 41st regiment, to wit, one *James Eman*, nor the defendant, had paid to the plaintiff the said sum of 30*l.*, or any part thereof. There was also a count upon an account stated.

The defendant pleaded — first, non assumpsit to the first count — secondly, to the first count, that he, the defendant, did not cause or procure the said advertisement, hand-bill, or placard to be printed or published, in manner and form &c., concluding to the country — thirdly, that the plaintiff did not cause the said offender to be apprehended, in manner and form, &c., concluding to the country — fourthly, that the plaintiff did not cause the said offender to be convicted, in manner and form, &c., concluding to the country — fifthly, that the said property was not recovered, in manner and form, &c., concluding to the country — sixthly, that the plaintiff did not cause the said property to be recovered, in manner and form, &c., concluding to the country — seventhly, non assumpsit to the second count.

Upon each of these pleas issue was joined.

The plaintiff is, and at the time of the transaction in question was, a policeman of *Canterbury*; and the defendant is, and at the said time was, the colonel of

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the 41st regiment of infantry, at that time quartered at *Canterbury*. On the 26th of *April*, 1844, the defendant was robbed of certain articles of jewellery hereinafter set forth, and immediately gave directions to one Serjeant *Newton*, for the printing and publication of the following advertisement or hand-bill.

“ 30*l.* Reward.

“ Stolen from the officers’ quarters of the infantry barracks, *Canterbury*, on the night of *April* 26th, 1844, the following articles, *viz.* one diamond ring (four large diamonds); one old family ring (male portrait, large, set in small diamonds); one purple topaz large ring, set in small diamonds; one turquoise (blue) gold ring; one *French* enamel ring; money to the amount of 3*l.*; one flat *Geneva* watch (gold), with short gold chain, and long hair chain.

“ The above sum will be paid by the adjutant of the 41st regiment, *on recovery of the property, and conviction of the offender*, or in proportion to the amount recovered.”

The articles were stolen by *William Warren*, who was apprehended, and was tried and convicted at the *July* sessions for the city of *Canterbury*, in 1844, and received sentence of transportation for the offence.

On the 10th of *June*, 1844, one *Fitzgerald*, a private soldier, came to and informed Serjeant *Newton*, of the 41st regiment, that *William Warren* had asked him to lend him some money to enable him to go to *London*, to dispose of the property he had stolen from Sir *Richard England*. Up to that time, no suspicion had attached to *Warren*. Serjeant *Newton* thereupon, on the same day, gave information of this fact to the superintendent at the police-station, but did not then see the plaintiff. Early in the morning of the 14th of *June*, a person of



the name of *Pickering* gave information to a police-officer of the name of *Epps* where *Warren* was to be found: but *Epps* did not arrive in time to find him at the place named by *Pickering*. At a late hour on the same day, the plaintiff received information that *Warren* was at a certain public-house in *Canterbury*, and immediately proceeded thither, taking with him two other policemen as his assistants. These parties finding *Warren* at a certain other public-house in *Canterbury*, seized him; and, after much resistance, the plaintiff searched him, and took from him the diamond ring and the old family ring mentioned in the above advertisement, together with two pawnbrokers' duplicates, relating, the one, to the *Geneva* watch, the other, to the purple topaz ring, both also mentioned in the advertisement. The plaintiff immediately apprehended *Warren*, took him to the station-house, and gave him in charge; and, on the following day, gave information of the above facts to the magistrates of *Canterbury*, and applied to them for a remand of the prisoner to the 20th of *June*, to enable him, the plaintiff, to go to *London*, and trace the stolen property mentioned in the pawnbrokers' duplicates. The plaintiff then obtained two summonses for the attendance of witnesses at *Canterbury*; and, on the 20th of *June*, again appeared before the said magistrates, having brought with him from *London* a pawnbroker, who produced before the magistrates the said purple topaz large ring, and also the foreman of another pawnbroker, who produced the flat *Geneva* watch and gold key mentioned in the other duplicate. The plaintiff also produced the old family ring, and the diamond ring. The pawnbroker and the foreman then respectively identified *William Warren* as the person who had pledged the topaz ring and watch with them on the 10th of *June*: and the articles in question were all identified by the

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defendant as being his property, and as having been stolen from him on the previous 26th of *April*.

The plaintiff incurred much trouble and expense bringing together the witnesses for the prosecution. The plaintiff, and witnesses by his direction, appeared and gave their evidence, at the trial, to the effect above stated. It formed no part of the ordinary duty of the plaintiff, as a policeman, to make a journey to *London* in search of evidence against *Warren*. All the property stolen from the defendant was recovered and restored to him, with the exception of the turquois (blue) gold ring, money to the amount of 3*l.*, the short gold chain, and the long hair chain, mentioned in the advertisement. The value of the property so recovered and restored was 85*l.* 15*s.*, and that of the articles not recovered amounted to about 9*l.*

The adjutant mentioned in the advertisement, *or James Eman*, by the direction of the defendant, refused to pay the plaintiff the sum of 30*l.*

The jury, in answer to two questions of the learned judge, found specially — first, that the plaintiff did not give the first information as to the party committing the robbery — secondly, that the plaintiff was most active, and mainly instrumental, in procuring the recovery of the property, and the conviction of *Warren*; and they found a verdict for the plaintiff damages 25*l.*

The question for the opinion of the court is whether the plaintiff is entitled to recover all or any and if any, then what, part of the sum of 30*l.* And the court is to direct on what issues, and for which party the verdict is to be entered, or, if necessary, to direct a *nolle prosequi*, or a nonsuit, to be entered. And, as the whole of the declaration and pleas are not literally stated in the case, either party is to be at liberty to refer to them at length.



*Stee*, Serjt. (with whom was *Horne*), for the plaintiff. (a) The question is, whether the circumstance of

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(a) The points marked for argument were as follow:—

For the plaintiff—“That, according to the true construction of the defendant’s promise, the latter became bound to pay the sum of 30*l.* to any person through whose evidence and information, and by whose means and activity, the property stolen should be substantially recovered, and the offender convicted—that, if part only of the property should be recovered, and the offender convicted, then the defendant became bound to pay to any person through whose evidence and information, and by whose means and activity, such part should be recovered, and the offender convicted, a portion of the said sum of 30*l.*, bearing such proportion to the entire sum of 30*l.* as the value of the property recovered might bear to the value of the whole property stolen—that the plaintiff, having been most active, and mainly instrumental, by his evidence and information, in recovering substantially the whole of the property, and procuring the conviction of *Warren*, was entitled to the whole sum of 30*l.*, or, at the least, to a part thereof, although he was not the party who gave the *first* information—that the fact, as to who gave the *first* information, was only material as one ingredient in the inquiry as to who procured the recovery of the property, and the conviction of *Warren*—that, under the terms of the defendant’s pro-

mise, *Fitzgerald* was not entitled to the reward of 30*l.*, or any part thereof—and that the plaintiff was entitled, upon the facts stated in the case, and found by the jury, to have the verdict entered for him upon all the issues.”

For the defendant—“That the plaintiff was not entitled to recover the whole or any part of the reward offered by the defendant, because the facts stated and found on the case, did not bring the plaintiff within the terms or the legal effect of the advertisement—that the first count of the declaration ascribed a different effect to the advertisement than was consistent with its proper and legal construction—that, if the plaintiff’s construction of the advertisement were adopted, several other persons might sue the defendant for a part of the reward, according to the value of the property recovered through their agency—that, as it was admitted in the case, and expressly found by the jury, that the plaintiff was not the party who gave the first information which led to the conviction of *Warren*, the plaintiff was not the person entitled to sue—that, as there was a distinct traverse, in the fifth plea, of the allegation in the first count, that the whole property was recovered, when in fact only part was recovered, the defendant was entitled to the judgment of the court—that, if the plaintiff was entitled to recover any portion of the reward,



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the plaintiff's not having given the *first* information as to the party who committed the robbery, — though he is found to have been active, and mainly instrumental, in procuring the recovery of the property and the conviction of the offender, — disentitles him to claim the reward. In *Williams v. Carwardine* (a), it was held that a reward offered by a hand-bill to a person who shall disclose facts leading to a conviction for a felony, may be claimed by a person who, having notice of the hand-bill, makes a disclosure leading to the conviction of the felon, though solely influenced by motives of revenge against him. In *Lancaster v. Walsh* (b), a party who had been robbed of bank-notes put forth a hand-bill, wherein it was stated, that "whosoever would give information, whereby the same might be traced, should, on conviction of the parties, receive a reward of 20*l.*;" and it was held that the only person entitled to the reward, was he who first gave information by which the notes were traced to the robbers, *so as to insure their conviction*. In *England v. Davidson* (c), the defendant offered a reward to whoever could give such information as would lead to the conviction of a felon: the plaintiff, who was a constable and police-officer of the district where the felony was committed, gave such information: and it was held, on demurrer, that the plaintiff's having given information, was a good consideration for a pro-

he should have alleged that part only of the property was recovered, and that he sought to recover only a proportion of the 30*l.*, and not the whole of that sum — that the recovery of the whole of the property was a condition precedent to the plaintiff's, or any other party's, right to sue for the reward, or any part of it — that, if any party was entitled to the reward,

*Fitzgerald* was the individual in whom the right vested, and who ought to have sued — and that, from the uncertain and ambiguous terms of the advertisement, no liability attached to the defendant."

(a) 4 *B. & Ad.* 621., 1 *N. & M.* 418., 5 *C. & P.* 566.

(b) 4 *M. & W.* 16.

(c) 11 *Ad. & E.* 856., 3 *P. & D.* 594.



mise made by the defendant to pay the reward. In *Smith v. Moore* (a), the defendants, by public advertisement, offered a reward of 20*l.* to any person who would give such information as should lead to the apprehension and conviction of the party or parties who had broken into, robbed, and set fire to their premises. One *B.*, whom the plaintiff (a police-constable) had taken into custody on suspicion of being concerned in the offence, offered to make certain disclosures, if furnished with something to eat and drink. The plaintiff communicated this offer to a sub-inspector of police, who took *B.* to a public-house, and gave him refreshment; whereupon *B.* made a voluntary confession, which resulted in his conviction and transportation for the crime in question. And it was held that the plaintiff was entitled to the reward. In all these cases, it is to be observed that the reward was offered to a certain person. Here, however, there is no distinct specification of the party with whom the advertiser contracts. Nothing is said about information. The substance of the contract is, that the promised reward will be paid to the party by whose means the stolen property is recovered and the offender convicted. [*Maule, J.* To the exclusion of the person who gives the information that leads to that result?] Yes. All that the advertiser had in view, was, the recovery of the property, and the conviction of the offender. The person whose exertions produced those results, was the person with whom the advertiser contracted. [*Tindal, C. J.* Had *Fitzgerald*, the man who gave the information to Serjeant *Newton*, no claim to the reward?] Clearly not. What he said and did resulted in nothing. *Pickering's* information was equally fruitless. [*Cresswell, J.* In apprehending *Warren*, the plaintiff did no more than his duty. The journey to

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(a) *Ante*, Vol I., p. 438.



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*London* certainly was more than could be required him. But still, the question is, whether that bring him within the terms of the advertisement.] The plaintiff, by his exertions alone, brought about the recovery of the property, and the conviction of the offender; and unless the advertisement amounts to a mere honorarium engagement, he is clearly entitled to recover.

*Channell*, Serjt. (with whom was *Petersdorff*), for the defendant, was not called upon.

TINDAL, C. J. It is very unfortunate that this advertisement was not penned with more accuracy and certainty; for, its ambiguity has led to much useless expense. The only question, however, for us is, who is the person to whom the reward is properly payable? The advertisement, after describing the articles stolen, prefacing it with "30*l.* reward," says: "The above sum will be paid by the adjutant of the 41st regiment on recovery of the property, and conviction of the offender, or in proportion to the amount recovered." It is altogether silent as to the person to whom the money is to be paid. What, then, is the proper construction of the advertisement? and who is the party legally entitled to the reward? It appears to me that the money is to be paid to the person who was the original and meritorious cause of the recovery of the property and the conviction of the offender; that is, the person who first communicated the information that ultimately led to both. Upon the statement submitted to us, and the finding of the jury thereon, the present plaintiff is not that party. He did nothing until the 14th of *June*. *Fitzgerald* had previously, viz. on the 10th of *June*, communicated to Serjeant *Newton* that *Warren* was the culprit; and Serjeant *Newton* on the same day gave information at the police-station. O



the 14th, a person named *Pickering* informed *Epps*, a police-officer, that *Warren* was to be met with at a certain place ; but he was not taken at that time. At a later hour on the same day, the plaintiff, in consequence of information received by him, proceeded to a public-house in *Canterbury* where *Warren* was, and took him into custody. The plaintiff thus succeeded in recovering a portion of the property ; and he afterwards did good service in tracing and recovering almost the whole of it, and in procuring *Warren* to be convicted. But clearly he is not the party who first gave the information which produced that result. Nor is *Pickering*. Had it not been for the communication made by *Fitzgerald*, neither the one nor the other would have been at all contributory to such recovery and conviction. The clue once found, the plaintiff, in apprehending *Warren*, did no more than his ordinary duty, and what any other constable would have done on the like information. I therefore think a nonsuit must be entered.

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COLTMAN, J. It seems to me that we ought to construe engagements of this sort strictly as legal, and not as mere honorary engagements. The question here is, who is the person entitled to sue for this reward. The plaintiff must, to maintain this action, shew that he is *solely* entitled. Upon the facts presented to us, I think it is impossible to come to that conclusion. The plaintiff has not, as it seems to me, so good a claim as *Fitzgerald*. Possibly, an action might have been maintained by the two.

MAULE, J. The facts stated do not support the contract alleged in the declaration. Advertisements of this sort generally specify the person to whom the reward is to be paid ; and thence arises a legal obligation to pay the money. The omission disables me in this



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case from finding out, with any reasonable certainty, with whom the contract is made. The inference I should be inclined to draw, is, that the advertiser intended that the reward should be paid among such persons as should give information and assistance in the recovery of the property, and the conviction of the offender, in proportion to the importance and value of their respective services. It is difficult to put a value on information: it is not like work and labour, which has been accepted, and is to be paid for on a *quantum meruit*. The difficulty the defendant is placed in here; is one of frequent occurrence. It often happens that there is no one individual who gives information that is in itself useful; but that several persons give different pieces of information, the whole of which combined leads to the apprehension and conviction of the offender. One man discovers who he is, another where he is likely to be met with at a particular time, and so on. The advertiser should, in terms, bind himself to part with the sum offered, leaving it to be divided amongst the persons whose activity and address procure the desired result, in such proportions as some responsible person—the mayor, or the clerk of the peace, for instance—should in his discretion think fit. There being here a total absence of statement of the person to whom the reward is to be paid, and the plaintiff having failed to make out, even by inference, that he is the party intended, I think the contract is not correctly described in the declaration, and, therefore, that judgment of nonsuit must be entered.

CRESSWELL, J. I also am of opinion that the plaintiff has failed to make out a case to entitle him to the reward claimed. The advertisement is couched in extremely loose terms: it neither specifies the person to whom, nor the particular service for which, the money is



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to be paid. It may well be doubted, therefore, whether the contract is properly described in the declaration. Assuming, however, that the contract is properly declared on, there is a plea that the plaintiff did not cause the offender to be apprehended. Upon the facts stated, I think the plaintiff did not cause *Warren* to be apprehended. The police were set in motion by the information of *Fitzgerald*. *Fitzgerald*, therefore, was the person who caused *Warren* to be apprehended. It is true, the plaintiff's was the hand by which *Warren* was arrested; but he was merely acting as a peace-officer, upon information originally coming from *Fitzgerald*. Then, did the plaintiff cause *Warren* to be convicted? He gave evidence, it is true: so did the pawnbroker. It cannot be, that the reward is payable to all those who take a share in the transaction. In like manner, the plaintiff did not solely cause the property to be recovered. *Fitzgerald*, at least, contributed most materially. The case, in some of its circumstances, is remarkably like that of *Lancaster v. Walsh*. There, the advertisement was as follows: — "20*l.* Reward. Whereas, on *Saturday* night last, two Bank of *England* notes (describing them), and other moneys, were stolen from the person of Mr. *R. Walsh*, of *Halifax*, on his way home: whoever will give information by which the same may be traced, shall, on conviction of the parties, receive the above reward, on application to the said *R. Walsh*." It appeared that one *Brigg*, the deputy constable of *Bradford*, had, on the 1st of *August*, received information from one *Clark*, that one *Dyson* had confessed to him that he was a party to the robbery. Before *Clark*'s communication to *Brigg*, one *Illingworth*, the constable of *Wakefield*, had discovered that the stolen notes had been cashed at the *Wakefield* bank, and had taken into custody the parties who presented them for payment, who, however, were not the actual robbers. On the



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4th of *August*, the plaintiff gave the defendant information of *Dyson* being a party to the robbery. On the 5th, *Brigg* verbally communicated to *Illingworth* the information he had received; and, on the 14th, *Dyson*, who had absconded in the mean time, was apprehended by *Brigg*, and was arraigned for the robbery at the next *York* assizes, when he pleaded guilty. Upon this evidence, *Patteson*, J., left it to the jury to say whether any information had been given, previously to that given by the plaintiff, which could lead to the tracing of the notes to the party who stole them; expressing his opinion that the person entitled to the reward, was he who gave information, whereby the property was traced to the offenders, not he who merely traced where it was. The jury having found for the defendant, the court refused to disturb their verdict; holding the direction correct.

I think no reflection can fairly be made on Colonel *England* for not submitting to the claim of this plaintiff.

Judgment of nonsuit.

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COOPER v. SHEPHERD.

June 6.

A recovery in trover vests the property in the chattel in the defendant as against the plaintiff.

**T**ROVER, for a bedstead, one hundred pieces of wood, and one hundred pieces of iron.

Pleas — first, not guilty — secondly, not possessed — thirdly, as to so much of the declaration as related

In trover by *A.* against *B.* for a bedstead, *B.* pleaded a former recovery by *A.* in trover for the same identical bedstead against *C.*; averring that the conversion by *C.* for which that action was brought, was a conversion not later in point of time than the conversion mentioned in the declaration against *B.*, and that, before the conversion in that declaration mentioned, *C.*, being possessed of the bedstead, sold it to *B.*, who paid him for the same, and received it under such sale, and that the taking under such sale was the conversion complained of in the declaration against *B.*: — Held, that this plea was a good answer to the action.



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to the bedstead therein mentioned — that the plaintiff long before the commencement of the suit to wit, on &c., in the court of our lady the Queen of the Bench of *Westminster*, before &c., impleaded one *Benjamin Willomatt* in an action of trover, for converting, to wit, on the day and year in the declaration in that action mentioned, that is to say, on the 4th of *July*, 1844, among other goods and chattels in the declaration in that action mentioned, the same identical bedstead in the declaration in this action and in the introductory part of this plea above mentioned; that such proceedings were thereupon had in the said court in that action, that, afterwards, and before the commencement of this suit, to wit, on &c., the plaintiff, by the consideration and judgment of the said court, recovered in the said action against *Willomatt* 75*l.* for his damages which he had sustained on occasion of the converting by *Willomatt* of the said bedstead, and of the other goods and chattels in the declaration in that action mentioned; and also 126*l.* for his costs and charges by him about his suit in that behalf expended; whereof *Willomatt* was convicted; as by the record and proceedings thereof, still remaining in the said court of our lady the Queen of the Bench aforesaid, at *Westminster* aforesaid, more fully and at large appeared: that, after the recovery of the said judgment against *Willomatt* as aforesaid, and before the commencement of this suit, to wit, on &c., *Willomatt* fully paid and satisfied to the plaintiff the said several sums of 75*l.* and 126*l.*, in form aforesaid recovered against him, and the plaintiff then took and received the same of and from *Willomatt* in full satisfaction of the said judgment; that the said damages, so far as the same were estimated, assessed, recovered, paid, and received as aforesaid in respect of the said bedstead, were estimated and assessed, and were recovered and paid and received as aforesaid, as and for, and in respect of, and as the full value of, the said bedstead, and not



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otherwise, and were and amounted in fact to the full value of the said bedstead; that the said conversion of the said bedstead by *Willomatt*, for which the said action against *Willomatt* was brought, and in respect of which the said damages were estimated, assessed, recovered, and paid and received as aforesaid, was a conversion not later in point of time than the conversion above complained of against the defendant; that, just before and at the time of the conversion of the said bedstead by the defendant above complained of against him, the said bedstead being then in the possession of *Willomatt*, he, *Willomatt*, to wit, on the day and year above mentioned, sold and delivered the same to the defendant at and for a certain reasonable price in that behalf, to wit, the sum of 10*l.*, and the defendant then paid to *Willomatt*, who then accepted and received of and from him the defendant a large sum of money, to wit, 10*l.*, as and for, and in full satisfaction and discharge of, the said price of the said bedstead as last aforesaid, and the defendant then had and took and received the said bedstead of and from *Willomatt* to and for his the defendant's own use, and as and for his own, under and by virtue of such sale and delivery as aforesaid; and that the having, taking, and receiving of the same by the defendant as aforesaid was the same conversion of the said bedstead as was above complained against him the defendant — verification.

Special demurrer, assigning for causes — that it does not appear in or by the plea that the judgment recovered against *Willomatt*, and the payment and satisfaction to the plaintiff of the damages recovered by him, has any application to the cause of action and conversion to which the plea is pleaded — that it does not appear in or by the plea, that the conversion by *Willomatt*, in respect of which the plaintiff recovered against him as therein mentioned, was after the plaintiff was possessed of the said bedstead as in the declaration mentioned, or



that the plaintiff was not lawfully possessed of the said bedstead between the time of the said conversion by *Willomatt* and the said conversion by the defendant, or that *Willomatt* was possessed of and held the said bedstead under and by force of the said conversion by him at the time when he sold the same to the defendant — that a recovery against *Willomatt* of damages for one conversion of the said bedstead, was no reason or cause in law why the plaintiff should not recover damages against the defendant for another and different conversion of the same bedstead, the same being the plaintiff's property at the time of the last-mentioned conversion; and that the defendant, by not denying, admitted that the said bedstead was the property of the plaintiff at the time of the conversion thereof by him — that the plea argumentatively and by inference denies that the plaintiff was lawfully possessed of the said bedstead, as alleged in the declaration, and gives the plaintiff no colour to maintain his action against the defendant in respect of the said bedstead — that the plea concludes with a verification, instead of to the country — and that it does not appear in or by the plea, that the recovery against *Willomatt* was before the said conversion by the defendant, or that the said payment by *Willomatt* was before the said conversion by the defendant.

Joinder in demurrer.

*Douling*, Serjt., in support of the demurrer, submitted that the plea was bad, inasmuch as it admitted the plaintiff's property in the chattel, and admitted the conversion thereof by the defendant, and did not avoid the effect of such admission; or, that, if the plaintiff's possession was thereby traversed, it was traversed argumentatively only.

*Telford*, Serjt. (with whom was *Hawkins*), *contra*. The plea sets up a recovery by the plaintiff, in respect

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of the same identical chattel, in a former action of trover against *Willomatt* (a), from whom the present defendant purchased it. A judgment in trover changes the property, and vests it in the tort-feasor, by relation to the time of the conversion complained of: *Adams v. Broughton* (b); *Bishop v. Viscountess Montague* (c); 10 *Ad. & E.* 511, n.; 6 *M. & G.* 640, n.; *Unwin v. St. Quentin* (d). The plea is good, either as giving colour to the plaintiff, or as a special plea of satisfaction of the very conversion here complained of [Cresswell, J. The plea seems studiously framed to shew that the conversion in this case is a different conversion from that complained of in the former action.]

*Dowling*, Serjt., in reply. The title of the plaintiff, and the conversion by the defendant, are both confessed; and it is sought to avoid the effect of that confession by means of the judgment recovered against *Willomatt* at some indefinite time before the conversion by the defendant. There is no allegation that the conversion by *Willomatt*, and the conversion mentioned in this declaration, are identical. [*Erle*, J. At the time of the recovery of the judgment in the former action, the title of *Willomatt* was complete.] Upon this plea, it must be taken that the property in the chattel is still in the plaintiff. In *Unwin v. St. Quentin*, the title admitted was avoided by matter accruing subsequently to the colourable title of the plaintiff. Here, the effect of the admission is sought to be avoided by matter antecedent. [Cresswell, J. It certainly is not shewn that the transfer from *Willomatt* to the defendant was anterior to the judgment obtained in the former action.]

(a) See *Cooper v. Willomatt*,  
*ante*, Vol. I. p. 672.  
 (b) 2 *Str.* 1078.

(c) *Cro. Eliz.* 824.  
 (d) 11 *M. & W.* 277.



The court suggested, that the defendant had better  
and; but *Talfourd*, Serjt., elected to take judgment  
the plea.

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*Cur. adv. vult.*

INDAL, C. J., now delivered the judgment of the  
it.

the plaintiff declared, in trover, for converting his  
stead; and the defendant, besides pleas of the general  
not guilty, and a denial of the plaintiff's posses-  
pleaded in bar of the action, as follows, viz., that  
plaintiff, before the commencement of this suit, re-  
received judgment in an action of trover brought against  
*Willomatt*, for the conversion by him of this same  
tical bedstead, and received from *Willomatt* the  
ment of the damages and costs on such judgment,  
damages, so far as related to the bedstead, having  
assessed, and having been received by the plaintiff,  
the full value of the bedstead, and, in fact, amount-  
to such value. The plea then states, that the con-  
sion by *Willomatt*, for which that action was brought,  
a conversion not later in point of time than the  
version in the declaration mentioned; and that, be-  
the conversion in the declaration mentioned, *Willomatt*,  
being possessed of the said bedstead, sold it to the  
endant, who paid him for the same, and received it  
for such sale; and that the taking under such sale is  
conversion complained of in the declaration. So  
the plea amounts, in substance, to this, that *Willomatt*  
took and converted this bedstead, and, whilst he  
it in his possession, the defendant bought it of him,  
paid him for it; and that the plaintiff has recovered  
from *Willomatt*, and has received from him the pay-  
ment of, damages for such conversion, being the full  
value of the bedstead.

To this plea, there is a special demurrer; and the



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argument before us has been, that the plea is bad, either upon the ground, that, if taken as a traverse of the plaintiff's possession, it is argumentative only; or, if taken as a confession, there is no avoidance.

But we think the plea is not objectionable upon either of these grounds. The plaintiff, in trover, where no special damage is alleged, is not entitled to damages beyond the value of the chattel he has lost; and, after he has once received the full value, he is not entitled to further compensation in respect of the same loss: and, according to the doctrine of the cases which were cited in the argument, by a former recovery in trover, and payment of the damages, the plaintiff's right of property is barred, and the property vested in the defendant in that action. See *Adams v. Broughton* (a), and *Jenkins* (b), where it is laid down — “*A.*, in trespass against *B.* for taking a horse, recovers damages; by this recovery, and execution done thereon, the property in the horse is vested in *B.* *Solutio pretii emptionis loco habetur.*”

Now, the present plea ought, as it appears to us, to be construed as alleging a sale by *Willomatt* to the defendant *before* the plaintiff recovered judgment against *Willomatt*. And, if the plea be so construed, it would be a confession of a cause of action, avoided by matter subsequent, viz. by the recovery of satisfaction for the same cause of action from another; for, the damage to the plaintiff is the cause of his action, and the loss of the chattel is that damage; and, though the conversion by the defendant is different from the conversion by *Willomatt*, and may make either the one or the other liable to the plaintiff, at his election, yet satisfaction from one is a defence for the other. Thus, in *Bird v. Randell* (c), the recovering from a servant damages for

(a) 2 *Str.* 1078. See the case more fully reported, *Andrews*, 18. (b) 4th *Cent.*, *Ca.* 88. (c) 3 *Burr.* 1345.



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leaving the service of his master, was a bar to an action against the defendant for seducing the servant to leave his master's service; because the loss of the service was a damage, and that damage was compensated for in the first action. But, if, on the other hand, the plea be construed to allege the sale to the defendant to be *after* the recovery by the plaintiff from *Willomatt*, still the plea, as to this point, may be sustained, as giving, what has been called in modern cases, implied colour to the plaintiff; for, it admits that the plaintiff had, at one time, a right of property, but shews that right to be barred by the matter of the plea. Like the case of a plea, to an action of trover, of sale to the defendant in market overt; or of the taking by the defendant for wreck, or for waif; which pleas may be pleaded in trover or trespass: *Comyns v. Boyer* (a): and see also *Leyfield's case* (b); *Urcin v. St. Quentin*. (c)

And, as to the further objection, that, if the plea contained a confession of the cause of action, it did not also contain an avoidance thereof, inasmuch as it did not certainly appear that the possession by *Willomatt*, in respect of which the plaintiff recovered, continued till the sale by him to the defendant; and that it was consistent with the plea, that the plaintiff might have acquired the property a second time, and *Willomatt* might have again wrongfully taken it from him before the sale by him to the defendant; we think that the possession in *Willomatt* which is first alleged in the plea, and which became rightful by the recovery in trover, and payment of the damages, must be taken to have continued when the sale to the defendant took place, inasmuch as nothing appears to the contrary. The plea alleges, in effect, that *Willomatt* took pos-

(a) *Cro. Eliz.* 485.(c) 11 *M. & W.* 277.(b) 10 *Co. Rep.* 90. l.



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session, and that, being possessed, he sold to the defendant: and, although it would have been more certain if it had been pleaded that he, being so possessed, sold; still it appears to us sufficiently certain in its present form, on the principle that no change in the possession is to be presumed. We therefore think that judgment ought to be given for the defendant.

Judgment for the defendant.

DOE dem. ATKINSON v. FAWCETT and Others.

June 6.

A., by a will (executed before the 1st of January 1838), devised as follows: — “ I give and bequeath to my son B. my moiety of the house he now lives in, and all my personal property in his keeping: ” — Held, that B. took the moiety of the house in fee.

**EJECTMENT** for a house at *Richmond*, in *Yorkshire*.

At the trial, before *Rolfe*, B., at the last summer assizes at *York*, it appeared that the house had been purchased in 1811, by *George Atkinson* the elder, and *George Atkinson* the younger, as tenants in common. By his will, dated the 24th of *April*, 1834, *George Atkinson* the younger devised as follows: —

“ Memorandum, that I give and bequeath to my son *Richard Atkinson*, of *Richmond*, who has always shewn me good duty and kindness, my moiety of the house which he now lives in, in *Finkle Street*, in *Richmond*, and all my personal property now in his keeping, and elsewhere, except the few articles herein named, which are now in my possession at the *Hagg* cottage, and which things I give to my dear granddaughter *Mary Ann Alderson*,” &c.

On the part of the lessor of the plaintiff, it was contended that *Richard Atkinson*, the son, took under this



devise only an estate for life. For the defendants, who claimed under the devisees of *Richard Atkinson*, it was insisted that the words "my moiety of the house" carried the fee.

The learned baron was of opinion that *Richard Atkinson* took only an estate for life, and he so directed the jury, who accordingly returned a verdict for the plaintiff.

*Channell*, Serjt., in *Michaelmas* term last, obtained a rule nisi for a new trial, on the ground of misdirection. He cited *Bebb v. Penoyre* (a), *Roe d. Allport v. Bacon* (b), and *Paris v. Miller*. (c)

Sir *T. Wilde*, Serjt. (with whom was *Greenwood*), in *Easter* term, shewed cause. *Richard Atkinson*, under the devise in question, took a life estate only. A clear manifestation of the testator's intention to give him a larger estate, was necessary to oust the title of the heir. The word "estate" has been held to refer, not to the corpus of the property, but to the quantum of interest, and therefore to carry a fee. But the words "my house" are descriptive only of the thing given; and "my moiety" or "half-part" cannot have a more extensive signification. In *Fawcett's* case (d), "a man seized of an house and land, devised the moiety of his house to his wife for life: item, he devised the other moiety of his house to J., his second son: item, he devised to J., his second son, the said house, and all the lands which pertained to it, after the death of the wife." It was held that J. took an estate for life only, after the death of the wife, and not an estate in fee. That case has never been overruled. In *Pettywood v. Cooke* (e),

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(a) 11 *East*, 160.(b) 4 *M. & S.* 366.(c) 5 *M. & S.* 408.(d) 8 *Vin. Abr.* tit. *Devise*,

(L. a.) pl. 11.

(e) *Cro. Eliz.* 52.



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*Hawkins* was seised in fee of three houses in *Bury*, and devised them to his wife for life, the remainder of one of the messuages to *Robert*, his son, and his heirs, the remainder of one other of the messuages to *Christian*, his daughter, and her heirs, and of the third messuage to *Joan*, his daughter, and her heirs, having only the three children; and did further will, that, if any of the died without issue, then the survivors should enjoy *totam illam partem* equally divided between them. *Christian* took husband, and had issue the lessor of the plaintiff, and died: after, *Robert* died without issue; and then the feme of the testator died: *Joan*, being the survivor, entered into all the part of *Robert*, and took husband, and had issue the defendant, and died. And the question was, if the issue of *Joan* should have all the part of *Robert*, as a devise to his mother and her heir or if the issue of *Christian* should have a moiety with her as co-parcener. And all the justices held, that, by the devise, only an estate for life was limited to the survivor, and the fee did descend by course of law, as well to the issue of *Christian*, which first died, as to the survivor; and, though the words were, that the survivor should enjoy *totam illam partem*, that was, all the messuage, and not according to all the estate the party dying had in the messuage; for, no estate being limited, it should be intended but an estate for life. The doubt suggested by Lord *Ellenborough*, in *Bebb v. Penoyre* (a), where there were other words associated with “my half-part,” clearly is not sufficient to impeach *Pettywood v. Cooke* to such a degree as to prevent its being relied on as an important decision on this occasion. *Roe d. Allport v. Bacon* and *Paris v. Miller* are wholly beside the present case. In the former, the decision turned mainly upon the legal sense belonging to “estates,” in

.. (a) 11 East, 160.



the place and under the circumstances in which the word was found in that will: and, in the latter, where a testatrix, being seised in fee of an undivided fifth part, and of a moiety of another undivided fifth part, devised "my *share* of the *Bastile* and other estates, situate at C., and now in the occupations of T. and C., to my sister C. W.," it was held that a fee passed, Lord *Ellenborough* treating the question as one of grammatical construction only. In *Doe d. Clarke v. Clarke* (a), the testator, after charging such part of his property as might be necessary and adequate for the payment of his just debts, gave to his brother, R. C., all that dwelling-house, &c., with all lands appertaining to the same, lately in the possession of G. S. of W., or his mortgagee, the said property lying and being in the township of W.; and also gave to R. C. all the share, right, and property of the H. estate, situate in the county of *Chester*, as left by his late father; and it was held that R. C. took a life-estate only in the premises in W. So, under a devise of the testator's *share* in the *New River*, the devisees were held to take only for life; the word *share* importing his part only, not his estate or interest in it: *Middleton v. Swayne*. (b) In *Doe d. Ashby v. Baines* (c), the testator, after giving a pecuniary legacy to his heir-at-law, directed his debts and funeral expenses to be paid and discharged by his executrix after named: he then gave to his daughter E. S., whom he made, constituted, and ordained his executrix, all and singular his lands, tenements, and messuages, by her freely to be possessed and enjoyed: and it was held, that E. S. took only a life estate. Lord *Abinger*, in the course of the argument of that case, observed, that "a probability affording room for guessing that the testator intended to disinherit

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(a) 1 C. &amp; M. 39.

(c) 2 C. M. &amp; R. 23.

(b) *Skinn.* 339.



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his heir-at-law (*a*), is not sufficient." In *Doe d. Roberts v. Roberts* (*b*), the testator, after directing that all his debts and funeral expenses should be paid by his executors thereafter named, devised to *A.* a particular farm without words of limitation, and other farms to *B.*, *C.* and *D.*, respectively, in the same terms, and appointed *A.* and *B.* joint executors and *residuary legatees* of his will: and it was held that *A.* took a life estate only in the farm devised to her. *Parke, B.*, there says: "Unless we can see, upon a reasonable construction of the words of the will, enough to take away the estate from the heir-at-law, it must remain in him. It is very properly conceded, on the part of the defendants, that the devising clause itself is not sufficient to pass the fee; but reliance is placed, first, upon the charge of debts and funeral expenses; but that is only what the law would imply without any words. Then, the only other words relied upon are the concluding words of the will, in which the testator appoints *William* and *Elizabeth Roberts* joint executors and residuary legatees of his will. These are words confessedly applying, in their ordinary sense, to personalty only; and I think there is nothing in this will to apply them more largely." In *Doe d. Gwillim v. Gwillim* (*c*), it was held, that, under a devise of a house to *A.*, without words of inheritance (placed between two other devises in which heirs were named), the devisee took a life estate only, although by the will the deviser professed to dispose of his "worldly estate." And *Patteson, J.*, said: "I am not disposed to carry the effect of the word 'estate' further than has been done already." These authorities clearly uphold the direction of the learned baron in this case.

(*a*) In *England*, the nearest of blood cannot be truly *disinherited*, although the ancestor may in his lifetime, at common law, and, by statute, at his

death, render the heirship of no value.

(*b*) 7 *M. & W.* 382.

(*c*) 3 *B. & Ad.* 479., 2 *N. & M.* 247.



*Channell*, Serjt. (with whom was *Bliss*), in support of the rule. Under this will, *Richard Atkinson* took an estate in fee. The words used are clearly and unequivocally descriptive of the testator's interest, and the context shews a manifest intention to pass the whole. *Parke*, B., in *Doe dem. Templeman v. Martin* (a), says: "It may be laid down as a general rule, that all facts relating to the subject-matter and object of the devise, such as that it was or was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in the will." In construing this will, therefore, regard may be had to the fact, that the testator here had taken an undivided moiety of the house in question under the conveyance of 1811. And the words used are capable of including, and are the most apt that could be used to describe, the whole interest he took under that deed. *Bebb v. Pexeyre* is not relied on as an express authority on the point in dispute here, but only to the extent of the doubt thrown by Lord *Ellenborough's* observations, upon *Pettywood v. Cooke*: the distinctions, however, between that case and the present are quite immaterial. It is conceded that the word "estates" will now carry a fee: and, that that is so, is indicative of an anxiety on the part of the courts, so to construe the language used by a testator as if possible to carry out his intentions — an anxiety that did not exist at the time *Pettywood v. Cooke* was decided. *Paris v. Miller* follows up the inclination of Lord *Ellenborough's* opinion in *Bebb v. Pexeyre*; for, he there says: "This is not a devise of a portion which the deviser has carved out of the entirety: it existed in her as it is devised. The words 'my share,' as it seems to me, were used as denoting

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(a) 4 B. & Ad. 785.



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the interest; those which follow, the thing devised, and its locality; and the latter words, which describe the occupation, relate to the last antecedent, viz. the estate and not to the word share. It appears to me that the word *share* passes the fee." In *Middleton v. Sways* there was no other way of describing the interest than by the word share. In *Doe dem. Clarke v. Clarke*, the question was, what estate the father of the lessor & the plaintiff took in the premises at *Wybunbury*: there were no words calculated or intended to give a fee. In *Doe dem. Ashby v. Baines*, the devise of the testator's lands "freely to be possessed and enjoyed," was confessedly insufficient to pass a fee: and it was sought to take it out by a reference to extraneous matter. In *Andrew v. Southouse (a)*, a devise of the testator's land at *W.*, and all his interest in the estates of *J. C.*, deceased, to *L. A.* for life; and, after *L. A.*'s decease, *E. S.*, charged with an annuity to *J. T.* for life, was held to give a remainder in fee to *E. S.* And Lord *Kenyon* said: "For nearly half a century, it has been the will of the courts to give effect to the intention of the deviser as far as they can. It has frequently been observed that, in almost every case where the words of the devise have been so restrained as to give only an estate for life, the decision has been against what may be supposed to have been the private intention of the deviser. And Lord *Mansfield* often said that it appeared to him that persons, in general, who made their own wills, thought that the same words were sufficient to pass an estate of inheritance that are used to convey a mere chattel interest. Generally speaking, where there are no words of inheritance annexed to the devise of lands, only an estate for life will pass, unless there be something in the will to shew that the deviser intended to give a greater

(a) 5 T. R. 292.



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estate. But, in the will in question, there are, in more places than one, words to shew that the devisor intended to give an estate in fee." In *Roe dem. Allport v. Bacon* (a), the testator devised to his wife, "all and singular my freehold lands, messuages, and tenements, and &c., or elsewhere, together with all my household goods, &c., for life; and, after her decease, then all *the said estates*, goods, &c., to be divided among my sons (naming them), share and share alike:" and it was held that the sons took a fee in the lands after the death of the wife, and that the estate of one of them was well devised to another, by a devise of "all *my proportionable share* which belongs to me, after my mother's death," to him and his heirs. "In cases of this sort," said Lord *Ellenborough*, "unless the testator uses expressions of absolute restriction, it may in general be taken that he intends to dispose of the whole interest; and, in furtherance of this intention, courts of justice have laid hold of the word *estate*, as passing a fee, wherever it is not so connected with mere local description, as to be cut down to a more restrained signification. Now, in this case, we find the word *estates*, which at this day may be taken to be equivalent to *estate*, for the purpose of passing the whole interest; and really an argument is afforded from the company in which this word is found, why it should so mean; for, the testator devises all *the said estates*, goods, &c., amongst his sons, which, without doubt, passed the entire property in the goods to them; wherefore, by the aid of collocation, the word *estates* may, I think, fairly be intended to comprehend the entire interest in the lands." So, here, the collocation of the words leads to the necessary inference, that the testator intended his son *Richard* to take the fee: there is nothing on the face of the will to justify

(a) 4 M. & S. 366.



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a surmise, that he intended to die intestate as to the fee, which he must do if this construction of the will is not to prevail. In *Jarman on Wills* (a), the learned author, remarking upon the case of *Paris v. Miller* observes, that, “if the word ‘share’ be capable *proprie vigore* of carrying the fee, as being descriptive of the testator’s interest, there seems to be no reason why it should be restrained by words of locality, or other expressions applicable to the *corpus* of the land, seeing that the word ‘estate’ is not neutralized by such an association.”

*Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court: —

The question in this case was, whether *Richard Atkinson*, the son of the testator, took an estate in fee, or for life only, in the moiety of the house devised to him by his father’s will. The devisor was seised in fee-simple of one moiety of the house in which his son was living; and, being so seised, devised in these terms, viz. “I give and bequeath to my son *Richard Atkinson* my moiety of the house in which he now lives in, and all my personal property now in his keeping.” And the answer to this question depends, as it appears to us, upon the proper interpretation to be put upon the words “my moiety.” If those words do, in their natural and ordinary signification, import the *interest* which the testator had in the house, then we think this devise will carry the whole interest he had, that is, the fee: but, if, on the other hand, the words ordinarily have a narrower meaning, and are considered to import no more than half of a house, then, undoubtedly, the devise of that half of the house would be a devise for life only. And

(a) Vol. II. p. 193.



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to us that the word "moiety," which is accepted, generally, whether in pleading or construction, by the word "half-part," as synonymous with the word "moiety," carries with it the signification of a part or interest which the party takes in any matter; so that, when a man devises "his half-part," he devises his half-part or interest which he takes in the thing devised. The case of *Pettywood v. Pettywood*, which was relied upon in argument on the part of the plaintiff, does not in any manner affect the question. In that case, the deviser was not devising any particular part or interest in the fee, but the whole: the devise was not, as here, of "the third part;" but, being seised of the fee in several houses, he devises one of them to each of his daughters, and her heirs; and, if any of them should die without issue, then the survivors should enjoy "the third part," to be equally divided between them. The judges held, in that case, that no more than a life estate was limited by the devise over; and that "the third part," to be "the third part." In that case, the words limiting the devise cut down the estate of the daughters to an estate for life, and had made the devise, in effect, no more than a devise in tail to several, remainder over, without affecting any estate, which must therefore be for life. And, even as to this case, Lord *Ellenborough*, in his opinion in *Bebb v. Penoyre* (b), expresses a strong doubt as to the decision being right: and, in the case then before the court, that of the devise to the brother, of "his half-part" of the four freehold houses which I have mentioned, intimates an opinion that he should be allowed to think the words sufficient to carry a fee. The same learned judge expressed the same opinion,



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upon the devise of “my share,” in the case of *Pa v. Miller*. (a) He observes: “This is not the devise of a portion which the devisor has carved out of the entirety: it existed in her as it is devised. The words ‘my share,’ as it seems to me, were used as denoting interest:” which view of the case was adopted by the court.

Upon these grounds, we think the words of the devise are sufficient to carry the fee; and that the rule for a new trial must be made absolute.

Rule absolute

(a) 5 M. & S. 408.

## BOWLBY v. BELL.

June 6.

*A.*, a share-broker, on the 28th of July, 1845, contracted to sell to *B.* certain railway shares belonging to *C.* The scrip having been

**T**HIS was an action of assumpsit brought to recover the sum of 81*l.* 10*s.*, alleged to have been paid by the plaintiff to the defendant's use. The declaration contained the common counts for money paid, money lent, interest, and money due upon an account stated. Plea, non assumpsit.

sent to the company's office for registration, and *A.* being consequently unable to deliver the shares, *B.*, on the 23rd of September, purchased other shares at an advanced price, and claimed the difference from *A.* *A.* accordingly paid him the amount, after notice from *C.* not to do so — one of the rules of the *Hull* stock exchange, of which *A.* and *B.* were both members, declaring brokers to be personally responsible for the fulfilment of their respective contracts with each other — and claimed to be recouped the same by *C.*, as money paid to his use. The price of the shares had not been offered to *C.*, nor had any transfer been tendered to him for execution: — Held, that the action was not maintainable.

And held, that a letter from *C.* to *A.*, requiring all further communications to be addressed to his solicitors, did not dispense with the necessity of such tender.

A contract for the sale of railway shares is not a contract for the sale of goods, wares, or merchandise, within the 17th section of the statute of frauds.



The cause was tried before *Colcridge, J.*, at the last assizes at *York*. The facts were as follow : — The plaintiff was a share-broker at *Kingston-upon Hull*; the defendant a merchant at *Liverpool*. On the 28th of *July*, 1845, the defendant employed the plaintiff to sell for him five shares in the *Great Grimsby and Sheffield Railway Company*. The plaintiff on the same day sold them to one *Richardson*, at 4*l.* 15*s.* per share. At this time the shares had been sent in to the office of the company for the purpose of registration, pursuant to their act of incorporation, 8 & 9 *Vict. c.* 50. (local and personal) ss. 14. 15., which passed on the 30th of *June* preceding. By the act, registered shares can only be transferred *by deed*. In consequence of the delay which took place at the office of the company, the registered shares were not delivered out until the 12th of *November*. On the 11th of *August*, the plaintiff wrote to the defendant as follows : —

“The broker to whom I sold five *Grimsby and Sheffield*s, has just called to say, that, unless they are delivered to him on *Wednesday* or *Thursday* next, he shall buy them in against me at present prices, he being bound to deliver, himself. If it be possible, this must be avoided. I would therefore suggest that you write at once to the office, requesting them to return the above to me; telling them, at the same time, the situation in which I am placed, owing to the above shares being sent to register too early. There was no occasion to have sent them before the 16th instant. It is to be regretted that you have done so. Your clerk informs me that you sent them on the 16th ult.”

On the 15th, the defendant wrote that the plaintiff's letter should be attended to; adding that “the purchaser would have every thing fairly done to him, as soon as the shares were registered.” On the 16th of

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*August*, the plaintiff again addressed the defendant as follows : —

“ Nothing can be done with respect to the *Grimsby and Sheffield* shares. Mr. *Richardson*, the broker to whom I sold them, must either accept them as transferable stock, or not at all. It was distinctly understood, at the time the bargain was concluded, that the shares were then being registered : and it is any thing but fair, on the part of that gentleman, to call upon me at the eleventh hour to deliver them as unregistered stock, when, at the same time, he knew it was impossible to do so.”

On the 23rd, the defendant wrote to the plaintiff —

“ Am I to understand that the bargain for the *Grimsby and Sheffield* shares is void, or that the plaintiff takes them, paying 4½ and 2l. 10s. for first call, and pays the moment delivery is made ?”

To this the plaintiff replied on the 25th —

“ The buyer of your *Grimsbys* will pay the call, and expenses of transfer &c., when the proper time arrives for doing so.”

On the 26th, the defendant again wrote to the plaintiff as follows : —

“ Inclosed I beg to hand you the notice of call on the five *Grimsby* shares, which the buyer can please pay immediately, and transmit either direct or through my clerk, as I am desirous of having the business closed as quick as possible.”

The plaintiff replied on the following day —

“ The buyer of your five *Grimsbys* will pay the call on or before the 23rd of *September* next ; until which period the shares cannot be transferred (see the secre-



letter, inclosed): for the purpose of enabling the  
 user to do so, I retain the letter advising you of  
 all in question."

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the 1st of *September*, the plaintiff and defendant  
 when the latter signed the following memoran-

Mr. *George Bowlby*, — On or before the 23rd in-  
 I undertake to pay a call of 2*l.* 5*s.* per share on  
*Grimsby and Sheffield* shares sold by you on my  
 nt on the 28th of *July* last, and, as soon after as  
 le, pledge myself to execute the necessary transfer  
 pect thereof. The amount to be repaid.

(Signed) "*T. F. Bell.*"

is document was objected to, on the part of the  
 dant, as being inadmissible, for want of a stamp.  
 learned judge, however, admitted it, reserving the

he defendant paid the amount of the call on the  
 of *September*; and, on the 15th of *October*, he  
 e to the plaintiff as follows: —

As I am going out of town, I have placed the cor-  
 ndence with you relating to the *Grimsby* shares, in  
 hands of Mr. *Walker* (his attorney), to whom I beg  
 urther communications may be made."

n the 17th of *October*, *Richardson* wrote to the  
 iff as follows: —

I hereby give you notice that I shall, on *Tuesday*  
 the 21st instant, buy in on the best terms against  
 (unless you furnish me with the same in the in-  
 n,) five shares in the *Great Grimsby and Sheffield*  
*Iron Company.*"

On the following day, the plaintiff transmitted a copy  
 this notice to the defendant's attorney; and on the



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23rd wrote to inform him that the time had expired for delivering the shares, and that, in default, they would be purchased by *Richardson*, and the defendant charged with the difference of price. On the same day (the 23rd), *Richardson* did purchase five shares, at a price exceeding by 8*l.* 10*s.* the sum for which the plaintiff had contracted to sell them to him. On the 24th, notice was given to the defendant, or to his attorney, that *Richardson* had made the purchase, and claimed to be repaid the excess. On the 27th, the defendant wrote to the plaintiff as follows:—

“I have seen your notice, dated the 22nd (I think), and beg leave respectfully to caution you against paying any money on my account till the claim be settled in a court of law, when I will pay it myself.”

Notwithstanding this last communication, the plaintiff paid *Richardson* the difference of 8*l.* 10*s.* on the 7th of *November*, and now claimed to recover it from the defendant as money paid to his use. The plaintiff relied upon a rule of the stock-exchange at *Hull*, of which it appeared *Richardson* also was a member, though it did not appear that the defendant was, or that he was cognisant of the fact of *Richardson* being so, or knew of the existence of the rule. That rule provides “that all members of the association shall be individually responsible for the due fulfilment of their respective contracts with each other, if the principals be not named and accepted at the time of making such contract.”

There was no proof of any tender of the price of the shares, or of the call of 2*l.* 10*s.* per share, by *Richardson* to the plaintiff; or of any transfer of the shares having been prepared and tendered by *Richardson*, either to the plaintiff or to the defendant, for execution by the latter.

It was thereupon contended, on behalf of the de-



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defendant, that, as between himself and the plaintiff, there was no evidence of default on his part, to entitle the plaintiff to maintain the action; and that, if *Richardson* had sued the plaintiff, he could not have recovered without shewing a tender of the price of the shares, and also of a regular transfer, for execution. The learned judge reserved the point.

It was further objected that there had been unreasonable delay on the part of *Richardson* in repurchasing shares, two settling days having been permitted to elapse from the 28th of *July*; whereas, by the custom of the stock-exchange, it appeared that railway scrip must be delivered and paid for *on the second* settling day after the purchase. (a)

It was also objected, on the authority of *Child v. Morley* (b), that, at all events, money paid was not maintainable, but that, if the defendant were liable at all, the plaintiff should have declared specially. This point also was reserved.

A verdict was taken for the plaintiff for the amount claimed, subject to a motion.

*Channell*, Serjt., in *Easter* term last, accordingly obtained a rule nisi for a nonsuit, or for a new trial. He cited *Child v. Morley*, *Lightfoot v. Creed* (c), and *Stephens v. De Medina*. (d)

*Byles*, Serjt. (with whom was *Archbold*), on a former day in this term, shewed cause. The defendant, having employed the plaintiff to dispose of his shares, must be taken to have been cognisant of the course of dealing amongst brokers in the share market: and the liability to pay the money now sought to be recovered, having

(a) See *Tempest v. Kilner*,  
122, p. 249.

(b) 3 T. R. 610.

(c) 8 Taunt. 268.

(d) 4 Q. B. 422.



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been incurred by the latter at the request of the former, the present action is well conceived. *Richardson* might have sued the defendant — *Thompson v. Davenport* (a): the payment, therefore, by the plaintiff was in discharge of his liability. In *Child v. Morley*, the judgment proceeds entirely on the ground that the broker incurred no personal responsibility. Here, however, the broker is personally liable. [*Coltman*, J. How can the defendant, who is not a member of the *Hull* stock-exchange, be bound by its rules?] When he employed the plaintiff to sell, he must be assumed to have given him the powers necessary to enable him to obtain the best price for his shares. In *Child v. Morley*, *Lawrence*, J., says: "Taking the transaction, as now disclosed, to be legal within the statute (b), there can be no objection to the plaintiff's becoming the guarantee of such a legal contract; and then, if he had paid the money on the default of the defendant, he would have stood in the common situation of a surety paying money for his principal; and it might have been a question whether, if, by the general usage of the stock-exchange, brokers contracting for the sale of stock, and not disclosing the names of their principals, were considered as impliedly pledging their own credit for the faithful performance of the contract, such general usage might have been deemed equivalent to an express guarantee on the part of the plaintiff, and then the money paid by him in default of his principal would have been money paid to the use of the defendant." *Lightfoot v. Creed* merely shews that *Richardson* could only have brought a special action against either the plaintiff or the defendant for the breach of contract. Then, the plaintiff being liable to *Richardson*, he was not bound to wait

(a) 9 B. & C. 78, 4 M. & R. 110.      (b) 7 G. 2. c. 8.



until *Richardson* brought an action: *Pitt v. Purssord* (a); *Kemp v. Finden* (b). [*Maule*, J. He clearly could not have charged the principal with the costs of such an action.] The defendant, by his letter of the 15th of October, 1845, dispensed with the necessity of any tender, either of the price of the shares, or of a regular transfer.

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The memorandum of the 1st of *September* did not require a stamp. [*Cresswell*, J., referred to *Humble v. Mitchell* (c), where it was held that shares in a joint-stock banking company are not goods, wares, or merchandises, within the statute of frauds.] It is, in truth, no agreement at all: it was a mere authority to the broker to say something. [*Tindal*, C. J. There is no consideration on the face of it.] Even if it were an agreement, it is not of the value of 20l.: the amount of the call was only 11l. 5s. *Latham v. Rutley* (d); *Chadwick v. Sills* (e).

The time at which *Richardson* bought in other shares was a reasonable time after the defendant's default.

*Channell*, Serjt. (with whom was *Atherton*), in support of the rule. *Child v. Morley* shews that money paid will not lie, unless it be clearly made out that the broker incurred the legal responsibility of a surety. [*Maule*, J. The effect of the rule of the *Hull* stock-exchange, supposing it to be incorporated with the contract, is, to make the broker a surety for his principal.] That rule only applies as amongst the members of the association: the defendant is not to be affected by any liability the plaintiff has thus voluntarily contracted. None of the correspondence between the

(a) 8 M. &amp; W. 538.

(d) R. &amp; M. 13.

(b) 12 M. &amp; W. 421.

(e) R. &amp; M. 15.

(c) 11 Ad. &amp; E. 205., 3 P.

4 D. 141. *Vide ante*, p. 251.



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parties shews this rule to have been brought knowledge of the defendant either at or at making the contract. [*Maule, J.* The letter 11th *August*, gives the defendant notice that the has sold the shares upon such terms as to ent purchaser to call on him personally for the fulfil the contract. It is mentioned as a matter that c the defendant; and he does not repudiate it.] of parliament incorporating the company requi transfer of registered shares to be *by deed*: and pears from the correspondence that this was a registered shares. The defendant, therefore, cou be charged with a breach of his contract, up refusal to transfer the shares, upon payment stipulated price, and a tender of a transfer d execution: *Stephens v. De Medina (a)*. [*Maule, J* the plaintiff bound to wait until *Richardson*, th chaser, had prepared himself with a transfer, an than he was bound to wait until an action ha commenced against him?] It may be conced he was not bound to wait for a writ: but the liab the defendant could not arise until his refusal to e a transfer.

The agreement of the 1st of *September* ought t been stamped. It relates to a subject-matter exc the value of 20*l.* It is not a mere agreement the call, but also to transfer the shares. [*Colt* Is this a memorandum upon which either *Rich* or the plaintiff could have maintained an ac *Richardson* clearly might. And if, by virtue rule of the *Hull* stock-exchange, the plaintiff l a principal, as between the purchaser and him enures as an agreement between the plaintiff a defendant; it being evidence upon which the



could rely as an agreement by the latter to transfer the shares to the purchaser. [*Maule, J.* The stamp act imposes the duty where the performance of the agreement is of a certain value exceeding 20*l.*] The performance of this agreement is of a value exceeding 20*l.*: the agreed price of the shares, exclusive of the call, being 29*l.* 15*s.* [*Maule, J.* It is not an agreement for, or even relating to, the sale of the shares: but, the shares having already been agreed to be sold, it is an engagement by the defendant that he will pay calls for which he is already liable, with something else which is idle.]

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*Cur. adv. vult.*

TINDAL, C. J., now delivered the judgment of the court.

In order to maintain this action for money paid to the use of the defendant at his request, it was necessary that the plaintiff should prove either an actual request on the part of the defendant, or that the money was paid in discharge of some liability which the plaintiff had taken upon himself by the defendant's authority. No evidence was given of any *actual* request: it is, therefore, necessary to inquire whether the plaintiff paid to discharge some legal liability, and whether he incurred that liability by the defendant's authority. The precise nature of the contract which he entered into was not proved; but the evidence given by *Richardson*, on cross-examination, tends to shew that the contract was for registered shares. He says: "The shares were in for registration at the time I purchased. It was understood, at the time of the bargain, between the plaintiff and me, that the shares were then being registered." If the contract was for unregistered shares, it may be collected from the correspondence that the defendant did not authorise the plaintiff to make such a contract; and, if he did make it, and thereby incurred a liability to



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have shares bought in against him, he cannot charge the defendant with the loss sustained. See the letter from the plaintiff to the defendant, of the 11th of *August*, from the defendant to the plaintiff, of the 15th *August*, and from the plaintiff to the defendant, of the 16th of *August*.

Again, whatever was the form of the contract, must be taken, against the plaintiff, that the purchaser agreed that it should be treated as a contract for registered shares; for, in answer to the defendant's letter of the 23rd of *August*, inquiring whether the contract was to be treated as void, the plaintiff answered on the 27th, that *Richardson* would pay the contract price, and the amount of the call which had then been made, and which it would be necessary to pay in order to have a transfer of the shares, after registration. The defendant thereupon paid the call, and then nothing remained to be done but the execution of a transfer which *Richardson* ought to have prepared and tendered for execution, together with the purchase-money; and until he did so, he would not be in a situation to maintain an action for not transferring the shares, according to *Stephens v. De Medina*. (a)

No evidence was given of any further communication between the parties, until the 15th of *October*, when the defendant wrote to the plaintiff, saying, that, as he was going from home, he had placed the correspondence in the hands of his attorney, and requesting that all future communications might be made to him. This, it was said, amounted to a refusal to complete the contract, and dispensed with the tender of a transfer: but we think that such meaning cannot be attributed to it. And, although the plaintiff, by paying the difference when the shares had been bought in by *Richardson*, as

(a) 4 Q. B. 422.



far as he was concerned, waived such tender, we think he clearly had no authority to do so after the defendant's letter expressly desiring him not to pay any money on his account.

Upon the whole, then, it appears to us, that, if the contract was for unregistered shares, the plaintiff was not authorised to make it; and, if for registered shares, *Richardson*, not having tendered a transfer, was not in a situation to proceed against the plaintiff; and, consequently, that the payment by him was in his own wrong, and did not give him a right of action against the defendant for money paid to his use. The rule for entering a nonsuit must, therefore, be made absolute.

Rule absolute.

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LORD *v.* WARDLE.

June 6.

**A** RULE for a new trial, obtained at the plaintiff's instance, having, in 1837, been made absolute, on payment of costs (*a*), which were afterwards taxed at the sum of 102*l.* 4*s.*, but not paid, and no step having been since taken by the plaintiff, the defendant, on the

Where a rule has been made absolute to set aside a verdict found for the defendant, and for a new trial

on payment of costs by the plaintiff, and the plaintiff for more than a year fails to pay the costs, or to take any steps towards availing himself of the rule, the defendant cannot move to discharge it without previously giving a term's notice of his intention so to do.

An objection that such a notice has been given in the name of an attorney, other than the attorney upon the record, must be most distinctly pointed out. An affidavit by the plaintiff and his present attorney, (his attorney on the record being dead, and the rule having been made more than nine years ago,) stating "that they had not, nor had either of them, ever been served with any order to change the attorney, nor had they, or either of them, ever had any notice or intimation that any other party had been appointed attorney for the defendant, in the place or stead of the attorney upon the record," was held to be insufficient.

(*a*) See *Lord v. Wardle*, 3 N. C. 680., 4 Scott, 402.



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31st of *December*, 1845, gave a term's notice of his intention to move to discharge that rule. The notice was addressed to the plaintiff, to *John Becke* (successor to *Henry Becke*, of *Northampton*, deceased, the plaintiff's attorney), and to *George Becke* (late agent of *Henry Becke*, deceased, and also agent to *John Becke*), and was signed by *Hall* and *Mourilyan*, "defendant's agents."

*Channell*, Serjt., in *Easter* term last, obtained a rule nisi to discharge the rule for a new trial, citing *Champion v. Griffiths* (a), and *Solly v. Langford*. (b) The affidavits upon which the rule was obtained stated that the notice of motion had been served upon *John Becke*, and *George Becke*, and also upon the plaintiff himself; that the Messrs. *Becke*, upon application made to them respectively, disclaimed to act as attorneys or as agents for the plaintiff; and that no person could be found who was now acting as attorney or agent for the plaintiff.

*Byles*, Serjt. (who was instructed by *George Becke*, as agent for *John Becke*), now shewed cause, upon, amongst others, an affidavit of the plaintiff and *John Becke*, stating that the pleas of the said defendant in this action were pleaded by one *W. B. Bishop*, as the attorney for the said defendant; that the name of *Bishop* appeared on the record as attorney for the defendant; and that the deponents had not, nor had either of them, ever been served with any order to change the attorney, nor had they or either of them ever had any notice or intimation that any other party had been appointed attorney for the defendant in the place or stead of *Bishop*, nor did they or either of them know who

(a) 1 Dowl. N. S. 319.

(b) 13 M. & W. 151.



was the attorney for the defendant, otherwise than by the fact of the notice of motion having been served on them signed by "*Hall & Mourilyan*, defendant's agents," and by the affidavit of *N. H. Rowsell*, sworn in this cause on the 7th of *May* instant, in which he described himself of the firm of "*Hall, Mourilyan & Rowsell*, attorneys for the above-named defendant." The learned serjeant submitted, that the notice of motion was insufficient, inasmuch as it was not signed by the attorney upon the record, and there had been no rule or order to change the attorney; and that the lapse of time since the rule was made absolute, justified the plaintiff in availing himself of any technical objection to defeat the present motion.

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*Channell*, Serjt., in support of the rule. The objection is one of the very strictest; and the party urging it is bound to make it out conclusively. This, however, he has failed to do; for, the affidavits merely state that the deponents (the plaintiff and *John Becke*) have not been served with any order to change the attorney, nor have they or either of them ever had any notice or intimation that any other party had been appointed attorney for the defendant in the place of *Bishop*. *Non constat* but that there may have been a change of attorneys, of which *Henry Becke*, the original attorney for the plaintiff, had notice. Besides, it is by no means clear that a term's notice is necessary at all after verdict. In *May v. Wooding* (a), Lord *Ellenborough* says: "The reason of the rule (b), is this, that, while the matter is still in controversy, the party should, after so long a lapse as four terms without any proceedings, have notice, that he may prepare himself; but, when the matter has passed *in rem judicatam*, by the verdict,

(a) 3 *M. & S.* 500.(b) *C. P., E.* 13 *G.* 2.



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the same reason does not apply. The rule of the court, therefore, relates merely to interlocutory stages of the cause. No instance is stated where it has been carried further, and there is no analogy to aid the case." [Tindal, C. J. There is no judgment here: the verdict is intercepted; it has not passed *in rem judicatum*.]

*Byles*, Serjt., *contra*. *Tipton v. Meeke* (a) is an express authority to shew that a term's notice is necessary, before an application like this can be entertained. The plaintiff has negatived the change of attorney in the most positive and distinct manner that was possible. The party moving should be prepared to shew that he is in a proper position to do so.

TINDAL, C. J. This is an objection of an extremely strict nature; and I think the party urging it ought to make it out very clearly, to induce us to give effect to it. The affidavits filed in answer to this motion do not however shew, so distinctly as they should do, that the attorneys in whose names the term's notice was given were not duly authorised to give it. The rule must, therefore, be made absolute.

The rest of the court concurring,

Rule absolute.

(a) 8 J. B. Moore, 579. And see *Deacon v. Fuller*, 1 C. & M. 349., 1 Dowl. P. C. 675.



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## HILL v. KITCHING.

June 8.

THIS was an action of assumpsit for work and labour &c. by the plaintiff, at the defendant's request, as a ship-broker, in and about causing and procuring certain persons trading under the firm of *Hills & Aldridge* to enter into a charter-party with the defendant, for the use and hire of a vessel called the *West Indian*, and in and about drawing, &c., divers charter-parties for the defendant, and for commission and reward, &c. There was also a count upon an account stated.

Pleas — first, except as to 4*l.*, non assumpsit — secondly, as to that sum, payment into court.

The cause was tried before *Tindal*, C. J., at the sittings in *London* after the last term. It appeared, that, on the 21st of *September*, 1844, in consequence of the

The actual earning of freight under a charter-party, is not a condition precedent to the right of the ship-broker to his commission for procuring the execution of the charter.

*A.*, a ship-broker, procured a charter-party to be made between *B.*, a ship-owner, and *C.*, under

which the owner contracted to bring home a cargo of guano, and the merchant agreed to pay freight at the rate of 4*l.* 15*s.* per ton, to be reduced to 4*l.* 12*s.* 6*d.* if the ship did not arrive off *Cork* or *Falmouth* on or before a given day. There was no express engagement on the part of *C.* to ship a cargo: — Held, that *A.* was entitled to recover from *B.*, upon a *quantum meruit*, for his work and labour in procuring the charter to be executed, without shewing the arrival of the vessel on or before the day mentioned, and notwithstanding only a very small quantity of guano had been shipped, and a small amount of freight actually earned; that the amount of compensation due to him was a question for the jury; and that, in estimating such compensation, they were properly guided by evidence of what was customary in similar cases.

A witness called for the plaintiff, stated, on the *voir dire*, that he had introduced the owner to the broker; that he had nothing to do with the negotiation, and had no claim on the owner; but that he expected, pursuant to arrangement, and to the custom amongst brokers, to receive half the amount of the commission the plaintiff might recover in this action: — Held, that the witness was not a necessary or proper party to be made a co-plaintiff, nor a person "in whose immediate or individual behalf" the action was brought, either wholly or in part, within the proviso in the 6 & 7 *Vict. c. 85.*, and consequently that he was made a competent witness by that statute.



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plaintiff's introduction, the following memorandum of charter was entered into between the defendant Messrs. *Hills & Aldridge* : —

“ It is agreed, &c., that the ship shall proceed direct to *Ichaboe*, and there load a full and complete cargo of guano, by the ship's boats and tackle, and by the labour of the crew, not exceeding what she can reasonably stow and carry, over and above her tackle, &c., and being so loaded, shall therewith proceed to *Cork* or *Falmouth* for orders, which are to be in waiting at both ports, whether to discharge there or at a safe port in the United Kingdom, or so near thereto as she can safely get, and deliver the same on being paid freight at and after the rate of 4*l.* 15*s.*, British sterling, per ton, and which freight the said merchants bind themselves to pay for every ton of guano so delivered at the port of discharge; restraint of princes and rulers, the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever, during the said voyage always excepted: the freight to be paid, one third on arrival at the port of discharge, and the balance by an approved bill on *London*, at three months' date: And it is further agreed, that, should the ship not arrive at *Cork* or *Falmouth* on or before the 30th of *April*, 1846, the rate of freight be only 4*l.* 12*s.* 6*d.* Penalty for non-performance of this agreement, 2000*l.*”

Witnesses called on the part of the plaintiff prove that the commission usually paid to ship-brokers for procuring charter-parties, was 5 per cent. upon the amount of freight; and that, upon outward freight, the broker was entitled to his commission immediately, and it was attempted to be proved that the commission on freight of homeward cargoes was payable on the execution of the charter-party; but this failed, none of the witnesses being able to state an instance of a





morandum in this particular form. On the part of the defendants, it was insisted that the commission was payable only upon freight actually earned.

The quantity of guano procured for the ship was so small, that, assuming the defendant's view to be well founded, the sum paid into court was sufficient to cover the plaintiff's commission.

It did not distinctly appear when the vessel arrived at her port of discharge; but it was assumed that she had arrived some time before the commencement of the action.

A witness named *Cramond* was objected to as incompetent on the ground of interest. He stated, on the *voir dire*, that, the defendant having applied to him to procure freight for his vessel, he applied to the plaintiff; that he afterwards introduced the plaintiff to the defendant; that the negotiation between them took place at his, *Cramond's*, office, but that he had nothing to do with it; that he had no claim against the defendant, but should receive half the commission from the plaintiff, if he recovered, pursuant to an agreement with the plaintiff to that effect, and the custom amongst brokers. His lordship thought the witness competent, under Lord *Denman's* act, 6 & 7 *Vict. c. 85.*, and accordingly admitted his testimony.

It was then objected that there was no proof that the plaintiff was licensed as a broker pursuant to the statute (a); it being insisted that the character in which the plaintiff declared was in issue under non assumpsit. His lordship was of opinion that the payment of money into court disposed of that point.

At the close of the plaintiff's case, his lordship was called upon to direct a nonsuit, on the grounds, that

(a) 57 *G. 3. c. lx.* A ship-broker is not a "broker" within this act. *Gibbons v. Rule*, 4 *Bingh.* 301., 12 *J. B. Moore*, 539.

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*Cramond* should have been a co-plaintiff; that the right to commission only arose upon freight actually earned and that, as the amount of freight to be earned depended on the quantity of cargo brought home, as well as upon the period of the ship's arrival at her port of discharge, no action could be maintained until that was ascertained.

A verdict was found for the plaintiff, damages 115*l.* 1*s.* 6*d.* leave being reserved to the defendants to move to enter a nonsuit, if the court should be of opinion that either of the above objections was well founded.

*Manning*, Serjt., accordingly, on a former day in this term, obtained a rule nisi for a nonsuit, upon the point reserved; or for a new trial, on the ground that *Cramond's* evidence was improperly received, and that the verdict was against the weight of evidence.

*Kinglake*, Serjt. (with whom was *M. Smith*), shew cause. *Cramond* was no party to the contract with the defendants, and therefore was not entitled to sue, either solely or jointly with *Hill*. The negotiation for the charter-party was conducted by *Hill*, and *Hill* was the only person entitled to the commission: *Burnett v. Bouch.* (a) The other ground — of incompetency, viz. that *Cramond* had an interest in the event of the suit inasmuch as he expected to receive half the commission that might be recovered by the plaintiff — is removed by the 6 & 7 *Vict. c. 85.*, the first section of which enacts “that no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, at the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding.”

(a) 9 *C. & P.* 620.



ceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law, or by consent of parties, authority to hear, receive, and examine evidence; but that every person so offered may and shall be admitted to give evidence on oath, or solemn affirmation in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest in the matter in question, or in the event of the trial of any issue, matter, question, or inquiry, or of the suit, action, or proceeding in which he is offered as a witness, and notwithstanding that such person offered as a witness may have been previously convicted of any crime or offence." This is precisely one of the cases the statute intended to meet; and does not fall within any of the exceptions in the subsequent proviso, which declares that the act "shall not render competent *any party to any suit, action, or proceeding, individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person in whose immediate or individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such person respectively,*" &c. *Cramond* is not, and could not be, a party to the suit individually named in the record, nor is he a person in whose immediate or individual behalf the action is brought, either wholly or in part. This is not like the case of trustee and *cestui que trust*. In *Sinclair v. Sinclair* (a), it was held that a *prochein amy*, though named in the record, is not "a party to the suit" within the statute, and that any interest he may have, or any liability that may attach to him in respect of

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(a) 13 M. &amp; W. 640.



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costs, is no longer a ground of objection to his competency as a witness.

The plaintiff was clearly entitled to the customary commission of 5 per cent. on the stipulated freight, soon as the charter-party was executed: *Broad Thomas (a)*; *Read v. Rann. (b)* There is no ground for the suggestion that the payment of the broker's commission is conditional upon the actual earning of freight by the ship, or that the right does not attach until her arrival at her port of discharge.

*Manning*, Serjt. (with whom was *Warren*) in support of the rule. There could not have been, under a charter-party, any adjustment of the amount of freight until the arrival of the *West Indian* at her port of discharge, or until the 30th of *April*, 1845, had passed. It was uncertain what quantity of guano would be brought home, the merchants not binding themselves to ship any; and it was uncertain whether the freight should be at the rate of 4*l.* 15*s.* per ton, or 4*l.* 12*s.* 6*d.* Consequently, the amount of commission remains in *dubio*, and no such promise as that alleged in the declaration can be implied by law. [*Tindal*, C. J. The plaintiff, at all events, may claim commission on the lower amount of stipulated freight. All the witnesses agreed that the broker is entitled to his commission upon the execution of the charter-party.] There were only two distinct instances proved of the payment at the outset, of commission upon homeward freight; and one of them was a case where the parties had an account between them, and it was settled voluntarily; the other was a case where the broker was also agent for the ship, and so was enabled to compel a premature

(a) 4 C. & P. 338., 7 Bingham. (b) 10 B. & C. 438.  
 99., 4 M. & P. 732.



payment of the commission. [*Maule, J.* Do you mean to contend, that, if the vessel had been lost on her homeward voyage, no commission would have been payable, because freight was not actually earned?] That would depend upon the terms of the charter-party. [*Maule, J.* Assume a charter-party in the ordinary form, — which would not entitle the owner to freight unless earned.] Probably that could not successfully be contended. It never could have been the intention of these parties, that the customary freight spoken of by the witnesses should be payable absolutely, upon a charter-party framed like this. And there was no evidence whatever to support a *quantum meruit*.

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*Cramond*, the witness, was the party originally employed by the defendant. Either the action should have been brought by *Cramond* alone, or he should have sued jointly with *Hill*. By the custom of the trade it appears, that, where one broker procures the ship, and another the merchant, they divide the commission between them. And here the witness stated, on the *voir dire*, that he was to have his share only in the event of the plaintiff succeeding in this action. He is, therefore, — precisely within the terms of the proviso in Lord *Denman's* act, — a person in whose immediate and individual behalf the action is brought in part; he is consequently disqualified from giving evidence in support of the plaintiff's claim. The case of *Sinclair v. Sinclair* is quite beside the present: a *prochein amy* has no personal interest; he is appointed by the court merely to watch over the interests of the infant.

The verdict was clearly against the evidence; for, though the witnesses who were called to prove the custom, stated upon their examination in chief that the commission was payable on the execution of the charter-party, it turned out, upon cross-examination, that the universal practice had been to pay commission on freight



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outwards at once, but to pay commission on homeward freight after the arrival of the vessel. [*Tindal, C.* All the witnesses who spoke to that, stated that the delay was only matter of courtesy.] To say that what is admitted to be matter of uniform practice is not matter of right, but of courtesy, is to give effect to the wishes of the witness against his testimony. At all events, the evidence did not satisfactorily establish a custom to pay the broker's commission on homeward freight, before the termination of the homeward voyage.

TINDAL, C. J. It appears to me that the verdict in this case ought not to be disturbed. With respect to that part of the rule which prays for a nonsuit, the objection is, that the plaintiff is not entitled to recover, by reason of uncertainty as to the amount upon which the commission was to be calculated, as well as uncertainty as to the period of the ship's arrival. The plaintiff brings his action for work and labour as a shipbroker. In reality the action is brought upon a *quantum meruit*. The plaintiff claims to be entitled to recover the amount of commission that is usually paid under similar circumstances. In proving what is customary, it is not to be expected that the evidence will tally in all the instances: there may be many cases in which the terms of the particular charter-party do not precisely accord with the one under consideration. The general result of the evidence in this case was, that the broker obtaining a charter, is entitled to a commission of 5 *per cent.* upon the stipulated freight. It is difficult perhaps, rigorously to apply this sort of evidence; but at all events, it is a measure for the guidance of the jury in exercising their discretion. Then, with regard to the uncertainty as to the amount of freight; — it is admitted that the broker's right to commission is not to depend upon the fact of the ship earning freight; and it is also admitted that the broker's claim is not liable



to be cut down by the loss of the vessel, or by her failure to get a cargo. If so, the plaintiff's right to recover cannot depend upon a nice calculation as to what cargo might have been brought home. So, also, as to the amount of freight the owners would be entitled to receive, if the vessel should arrive off *Cork* or *Wexford* on or before the 30th of *April*, 1845. The plaintiff would, at all events, be entitled to commission on the lesser amount. I can see no legal objection to the maintenance of the action; nor do I perceive anything unreasonable in the allowance of 5 per cent. There was no evidence called to prove it excessive: in fact, it has been tried again and again, and allowed.

Whether or not *Cramond* should have been a co-plaintiff, depends upon whether there was any privity of contract between him and the defendants. He stated, upon the *voir dire*, that he had no claim upon the defendant, but expected to receive half the amount of commission from the plaintiff if he recovered. There was no ground for making him a co-plaintiff.

As to the competency of *Cramond*, — that depends upon whether or not he comes within the exception in Lord Denman's act, which provides "that this act shall not render competent any party to any suit, action, or proceeding, individually named in the record, or any member of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make claim, or any person in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively." The former part of the proviso is free from difficulty; the interest of a party to the suit is direct and immediate: so, the tenant in ejectment has a direct and immediate interest, inasmuch as a judgment for the plaintiff would remove him from the land:

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and the interest of the landlord or other person whose right a defendant in replevin makes cognisable equally direct. Then comes the last clause, — “or person in whose immediate and individual behalf action may be brought or defended, either wholly or in part.” That would seem to include the tenant in common, and the landlord in replevin, and to carry the exception somewhat further. If it had appeared that the plaintiff had made over to *Cramond* a moiety of the commission, then I should have said that *Cramond* was a person in whose immediate and individual behalf action was in part brought. But that is not *Cramond*, though he claims a moiety of the commission, under a separate and distinct agreement with the plaintiff, has no right to lay his hand upon any part of the money to be recovered in this action. As there was no evidence to shew that he was any party to the bringing of the action. I therefore think the case does not fall within the proviso in question, and, consequently, that the objection to the competency of the witness is removed.

As to the last ground upon which the rule was made, viz. that the verdict was against the weight of the evidence, I can only say, that, in my opinion, the evidence was all one way, and that there is no pretence whatever for disturbing the verdict.

COLTMAN, J. I am of the same opinion. This is in truth, an action for work and labour by the plaintiff in procuring the charter-party to be made. Evidence was given on the part of the plaintiff to shew that the commission was payable upon the execution of the charter-party: and the contention on the part of the defendant was, that the commission on homeward freight was not earned until the arrival of the vessel. The amount of freight might depend upon the quantity of guano brought home; but not so the amount of



n, unless it can be made out that no commission  
ght is payable unless and until freight is actually  
: and that is not pretended. The evidence of  
, therefore, affords reasonable means for es-  
g the proper rate of commission.

ond clearly could not have sued, either alone,  
tly with *Hill*; for, though *Cramond* was applied  
he first instance, *Hill* was the party employed  
er, and the contract was made with him alone.

h regard to Lord *Denman's* act, it is material to  
that it distinguishes between parties having an  
in the action, and parties in whose immediate  
lividual behalf the action is brought. It appears  
that the party "in whose immediate and individual  
the action is brought," must be understood to  
he party who causes the action to be brought;  
at a witness is not brought within the proviso by  
shewing that he has an interest in the deter-  
n of the cause in a particular way.

LE, J. I also am of opinion that this rule should  
arged. It was insisted, on the part of the de-  
, that the plaintiff was not entitled to maintain  
on, his right to commission being dependent upon  
ount of freight to be earned on the homeward  
and, as no homeward freight was earned, no  
sion was payable. This argument is based upon  
prehension of the facts. It appears that the  
was employed by the defendant to procure a  
rd freight for his ship, and that he performed  
rk. An action being brought for compensation,  
necessary for the plaintiff to lay before the jury  
vidence as to the proper amount he was entitled  
his commission. For this purpose he called  
witnesses. Upon cross-examination, some of  
witnesses seemed to think that the charter-party

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in this case was not precisely in the terms in charter-parties are ordinarily framed. It does not ever, follow, that therefore the plaintiff is not entitled to some compensation for his trouble in procuring execution. It is said, that the stipulated payment was not properly freight. The question, however, not whether this is in strictness freight — though it would seem from the case of *Devaux v. P'Anson* (which it may be so called — but what compensation the plaintiff is entitled to receive for procuring the execution of this charter-party. The witnesses shewed that the amount of compensation was about what was found by the jury. The plaintiff was clearly entitled to something; and I think the jury might very properly take into their consideration what had usually been done in similar cases, though the terms of the charter-party in those cases may have differed from those of the present. When it was conceded that the right to compensation might arise, notwithstanding no freight might be earned, in consequence of the loss of the ship, or any other cause, it appeared to me that there was an end of the argument. If the broker's right to compensation were to depend upon the arrival of the vessel, and the quantity of cargo, he would be *pro tanto* an insurer not only against perils of the sea, but also against the chance of a cargo not being put on board. That the argument that would make the payment of freight contingent, has no foundation in reason or convenience.

With respect to the admissibility of *Cramond*, as a supposed necessity for making him a party to the action, the case stands thus: The defendant, having a ship to let, asks *Cramond* to procure a charter for it. *Cramond* applies to *Hill*. A negotiation takes place between the defendant and *Hill*, which results in

(a) 5 N. C. 519., 7 Scott, 507.



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latter procuring a charter-party to be executed for the defendant. It appears from *Cramond's* statement, that he is to receive something from the plaintiff for the introduction. This action is brought by *Hill* to recover the commission usually paid for such work as he has performed for the defendant. *Cramond* was no party to the contract with the defendant: he, therefore, could have no right to sue either alone or jointly with *Hill*. He is not necessarily, nor do I think he could properly be, a party to the record. It is contended, that, though not a party to the record, *Cramond* is within the proviso in Lord *Denman's* act. The general scope of the 6 & 7 *Vict. c. 85.*, is, to allow the examination of all persons, notwithstanding they may have an interest in the event of the suit. The meaning of the proviso is, that no person who is the formal plaintiff on the record, shall be called as a witness, nor any person who, though not the formal plaintiff, is yet substantially so. For instance, suppose a man assigns a bond, and sues the obligor on behalf of the assignee, the latter would be a person in whose immediate and individual behalf the action was brought, and therefore not an admissible witness. Here, *Cramond* does not employ *Hill* to bring the action, nor is it brought on his behalf. It may be that *Hill* may decline to pay him a moiety of the commission when he has recovered it.

I also think the verdict was quite in accordance with the evidence.

CRESSWELL, J. I am entirely of the same opinion. With respect to the grounds of nonsuit reserved, I have nothing to add. As to *Cramond*, I think he clearly is not a party contemplated by the proviso in Lord *Denman's* act. The action is brought to recover commission or compensation for effecting a charter-party for the defendant. The party who performed the work



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was *Hill*, and not *Cramond*. It is true, *Cramond* obtained the job for *Hill*. But, whatever understanding there may have been between *Hill* and *Cramond*, it is quite clear, that, as between the parties to this record, the work was done by *Hill* on his own account. Under the circumstances, no action could have been maintained against the defendants, either by *Cramond* alone, or by *Hill* and *Cramond* jointly. The fact of *Cramond* hoping to get a moiety of the sum that may be recovered by *Hill*, does not make this an action brought wholly or in part on his immediate and individual behalf.

Rule discharged.

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*A.* contracted to purchase of *B.* the goodwill, &c., of a public-house. On the back of the agreement was the following memorandum, written, and signed by *C.*, after the execution of the agreement by *A.* and *B.*: —

“ I hereby

undertake that my daughter, *B.*, shall perform all the covenants and conditions named in the annexed agreement, and hold and consider myself responsible for her.” The whole was described by the witness as having been one entire transaction. In an action against *C.* to recover back the deposit, on the purchase going off by the default of the vendor: — Held, that the agreement and indorsement might be looked at together for the purpose of making out a consideration for the defendant’s promise.

**A**SSUMPSIT. The first count of the declaration stated, that, on the 10th of *October*, 1845, by a certain agreement then made by one *Amelia Showler*, the plaintiff, and the defendant, the said *Amelia Showler*, in consideration of 30*l.* by the plaintiff, to wit, on &c. aforesaid, paid to the said *Amelia Showler*, and in the said agreement stated and alleged to have been paid as a deposit, upon the execution of that agreement, in part of the consideration money agreed to be paid for the goodwill, furniture, fixtures, effects, and stock in trade, in manner in the said agreement after mentioned, agreed to sell and transfer to the plaintiff, her interest



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in the house and premises in the said agreement, alleged to be known by the sign of the *White Bear, Upper Fore Street*, in the parish of *Lambeth*, and in the county of *Surrey*, at and for the sum of 150*l.*, conditionally, that, if the plaintiff should not be accepted as tenant by the landlord, upon the same terms that *Amelia Showler* then occupied the same, the deposit money then paid should be forthwith returned, and that agreement cancelled; that the said *Amelia Showler*, by the said agreement, further agreed to sell the said goodwill, and all the household furniture, fixtures, and effects, that she should have a right to sell in and upon the said premises, at and for the sum of 150*l.*; also the stock, not exceeding, in porter, three butts, ale, six barrels, and foreign and British spirits, cordials, and compounds, 35*l.*, at trade prices, in the usual manner; that the plaintiff, by the said agreement, agreed to purchase the said goodwill, goods, fixtures, utensils, and stock in trade, in manner before described, and to pay for the same on taking possession, *which it was by the agreement declared should be on or prior to the 20th of October, 1845*; that the said *Amelia Showler*, by the said agreement, further agreed that she would sign and deliver the notices, according to act of parliament, of her intention to quit the said premises, to the constable and overseer of the parish, and would also assign good and sufficient licences for carrying on the trade of a licensed victualler, on being paid for the unexpired time therein, to pay and clear all rent and taxes due to the time of giving possession as before described; and, further, that the said *Amelia Showler* should not be in any manner concerned in carrying on the trade of a licensed victualler, or retailer of beer, within half a mile of the premises above named, during the time the same was occupied by the plaintiff, or his wife, being a widow; and it was by the said agreement declared, that, for the due performance



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of that agreement, each of them, the said *Amelia* and the plaintiff, bound himself, his executors and administrators, to the other of them, in the sum of £30, which was in the said agreement alleged to be the amount of liquidated damages ascertained and payable in case of breach thereof; and that, by the said agreement, the defendant undertook that his daughter, the said *Showler*, should perform all the covenants and conditions named in the said agreement, and thereby declared that he held and considered himself responsible for the performance of the said Mutual promises: Averment, that, after the making of the said agreement and promises, and before the said *Amelia Showler* had completed the sale, or the plaintiff had completed the purchase, according to the terms of the agreement in that behalf, or otherwise, of the said goods and household furniture, fixtures, and effects, or of any part thereof, or of the premises by the said agreement to be sold, or of any part thereof, and before the commencement of the suit, to wit, on the 20th of October 1845, aforesaid, the plaintiff was not accepted as tenant of the premises in the agreement in that behalf mentioned by the said landlord, to wit, by one *Chatfield*, and who then was, the landlord in the agreement mentioned, upon the terms in the agreement in that behalf mentioned, to wit, the terms upon which the said *Amelia Showler* occupied the same as aforesaid; that the said landlord, to wit, the said *Chatfield*, wholly refused to accept the plaintiff as such tenant of the premises aforesaid upon the same terms, — whereof, the said *Amelia Showler*, and also the defendant, afterwards gave notice before the commencement of the suit, to wit, on the 20th of October 1845, aforesaid; and the said *Amelia Showler* was then requested by the plaintiff to return and repay to him the said deposit money, to wit, the said sum of 30*l.*, so received by her as aforesaid, according to the agreement in that behalf; yet the said *Amelia Showler* did not nor w



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when she was requested as aforesaid, or at any other time, return or pay to the plaintiff the said deposit money, to wit, the said 30*l.*, or any part thereof, but wholly refused and neglected so to do, and therein failed and made default; and the said *Amelia Showler* had not at any time paid to the plaintiff the said sum of 50*l.* in the said agreement mentioned, or any part thereof, although she was afterwards, and before the commencement of this suit, to wit, on &c., requested by the plaintiff to pay him the same, — of all which said several facts, matters, and premises, the defendant afterwards, and before the commencement of the suit, to wit, on &c., had notice: Breach, that the defendant, disregarding the said agreement, and his said promise, had not at any time held himself responsible, or been responsible, to the plaintiff, for the performance by the said *Amelia Showler* of the said agreement, or for the payment by her, according to the said agreement in that behalf, of the said sums of 30*l.* and 50*l.*, or either of them, or any part thereof, and had not at any time paid to the plaintiff the said deposit money, to wit, the said 30*l.*, or any part thereof, or the said 50*l.*, or any part thereof, although she was afterwards, and before the commencement of the suit, to wit, on &c., requested by the plaintiff so to do; and that the last-mentioned two sums of money were still wholly unreturned and unpaid to the plaintiff, and wholly unsatisfied and undischarged, contrary to the form and effect of the said agreement.

There was also a count for money had and received, and a count for money found due upon an account stated.

The defendant pleaded — first, non assumpsit, to the whole declaration — secondly, to the first count, that it never was agreed by and between the said *Amelia Showler* and the plaintiff, in manner and form as in the



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declaration alleged ; concluding to the country—thirdly, to the first count, that, after the making of the agreement and the promise of the defendant in the first count mentioned, and before any breach of the said agreement, or of the said promise, and before a reasonable time had elapsed for procuring the landlord of the said house and premises to accept the plaintiff as tenant thereof, to wit, on the 10th of *October*, 1845, he the plaintiff refused to purchase the said goodwill, fixtures, goods, utensils, and stock, or any part thereof, or to pay for the same, or any part thereof, or to become tenant of the said house and premises, or to accept or take the same, or any part thereof; verification.

The plaintiff joined issue on the first two pleas, and replied *de injuriâ* to the last.

The cause was tried before *Erle*, J., at the sittings at *Westminster* after the last term. The plaintiff put in an agreement, with two memoranda indorsed thereon, and bearing three several agreement stamps, as follows:—

“ An agreement made and entered into this 10th of *October*, 1845, between Miss *Amelia Showler*, of the *White Bear, Upper Fore Street, Lambeth*, of the one part, and *James Coldham*, of the other part, as follows: viz. the said *Amelia Showler*, in consideration of the sum of 30*l.* paid as a deposit upon the execution of this agreement, — part of the consideration money agreed to be paid for the goodwill, furniture, fixtures, effects, and stock in trade, in manner hereafter mentioned, — agrees to sell and transfer to the said *James Coldham* her interest in the house and premises known by the sign of the *White Bear, Upper Fore Street*, in the parish of *Lambeth*, and county of *Surrey*, at and for the sum of 150*l.*, conditionally, that, if the said *James Coldham* is not accepted as tenant, by the landlord, upon the same terms that the said *Amelia Showler* now occupies the



the deposit money now paid shall be forthwith  
 , and this agreement cancelled: and the said  
*Showler* hereby further agrees to sell the said  
 l, and all the household furniture, fixtures, and  
 at she shall have a right to sell, in and upon  
 premises, at and for the sum of 150*l.*; also the  
 not exceeding, in porter, three butts, ale, six bar-  
 l foreign and British spirits, cordials, and com-  
 35*l.*, at trade prices, in the usual manner: and  
*James Coldham* agrees to purchase the said  
 , goods, fixtures, utensils, and stock in trade,  
 as before described, and to pay for the same on  
 possession, *which shall be on or prior to the 20th*  
*October, 1845*: and the said *Amelia Showler* fur-  
 thermore, that she will sign and deliver the notices,  
 according to the act of parliament, of her intention to  
 quit the said premises, to the constable and overseer of  
 the parish, and will also assign good and sufficient  
 security for carrying on the trade of a licensed victualler,  
 as paid for the unexpired time therein; to pay  
 for all rent and taxes due to the time of giving  
 up as before described; and, further, that the  
*Amelia Showler* shall not be in any manner con-  
 cerned in carrying on the trade of a licensed victualler,  
 or of beer, within the distance of half a mile of  
 the premises above named, during the time the same is  
 held by the said *James Coldham*, or his wife, being  
 : And, for the due performance of this agree-  
 ment, each of the said parties bindeth himself, his exe-  
 cutors and administrators, to the other of them, in the  
 sum of 50*l.*, being the amount of liquidated damages  
 named and fixed in breach thereof. In witness  
 whereof the said parties have hereunto set their hands,  
 the first day of January, in the first year above written.

(Signed) “ *Amelia Showler.*

Witness, *W. S. Cafe.*”

“ *James Coldham.*”

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The memoranda indorsed on the above agreement were as follow:—

“ I hereby undertake that my daughter, *Amelia Showler*, shall perform all the covenants and conditions named in the annexed agreement, and hold and consider myself responsible for her. Dated, this 10th day *October*, 1845.

(Signed) “ *James Showler*

“ Witness, *W. S. Cafe.*”

“ I, *James Coldham*, promise to pay a further deposit of 30*l.* on the 13th instant, or this agreement to be null and void. Dated, this 10th day of *October*, 1845. And the said 5*l.* now paid to be forfeited.

(Signed) “ *James Coldham*

“ Witness, *W. S. Cafe.*”

*Amelia Showler*, the daughter of the defendant, was tenant of the *White Bear* public-house, the licences for which were taken out in her name. On the 10th *October*, 1845, she agreed with the plaintiff to sell him the goodwill, &c., of the house, upon the terms contained in the memorandum first above set out. After that memorandum was signed by both parties but at the same meeting, the memorandum signed by the defendant was written at the back thereof, and a witness who proved the execution stated, however, that the whole was one transaction.

The plaintiff paid a deposit of 5*l.* on signing the agreement. The further deposit of 30*l.* not being paid after the day stipulated, the forfeiture of the 5*l.* was insisted upon, and submitted to by the plaintiff.

The parties met on the 20th of *October* to execute the agreement; but, in consequence of the non-attendance of the person who was to examine the premises, nothing was then done; and it was verbally agreed



the matter should stand over until the following day. They accordingly again met on the 21st, when, the landlord declining to accept the plaintiff as his tenant, the plaintiff refused to complete the purchase, and claimed to have the deposit returned.

On the part of the defendant, it was insisted, that the memorandum signed by the defendant was a mere collateral undertaking, within the fourth section of the statute of frauds, and void for want of a consideration expressed on the face of it; and that the substitution of the 21st for the 20th of *October*, was a substantial variation of the agreement by parol.

The learned judge overruled the objections, and a verdict was found for the plaintiff on the first count, damages 30*l*.

*Byles*, Serjt., on a former day in this term, obtained a rule nisi for a new trial, on the ground of misdirection. He cited *Goss v. Lord Nugent* (a), *Rippinghall v. Lloyd* (b), and *Marshall v. Lynn*. (c) [*Cresswell*, J., referred to *Stowell v. Robinson* (d) and *Stead v. Dawber*. (e)]

*Talfourd*, Serjt. (with whom was *Bovill*), now shewed cause. Taking the agreement and the memorandum indorsed thereon together, the whole of which formed one entire transaction — *Spittle v. Lavender* (g) — there was a sufficient consideration for the defendant's promise. The principle laid down and acted upon in *Goss v. Lord Nugent*, and the other cases cited on the motion, is altogether inapplicable here. The landlord's consent to the substitution of the plaintiff as tenant, having been

(a) 5 B. & Ad. 58., 2 N. & M. 28.

(b) 5 B. & Ad. 742., 2 N. & M. 410.

(c) 6 M. & W. 109.

(d) 3 N. C. 928., 5 Scott, 196.

(e) 10 Ad. & E. 57., 2 P. & D. 447.

(g) 2 Brod. & B. 452., 5 J. B. Moore, 270.

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withheld, the defendant and his daughter were prepared to complete the contract on the 20th October. The necessity of their obtaining such conveyance clearly was not dispensed with, by the omission to the purchase-money on that day.

*Byles, Serje.* in support of the rule. The memorandum signed by the defendant was a separate and independent agreement. It contains no consideration; none can be imported from the agreement on the face of the paper. In *Spittle v. Latender*, the defendant expressly signed the contract as agent. [*Maule, J.* The circumstance of the one memorandum having been executed before the other was written, makes no difference, provided the whole was one transaction. (a)] The plaintiff's refusal to complete the purchase, entitled *Ans. Shuter* to retain the deposit. [*Maule, J.* It is impossible to say that the deposit was forfeited, when the landlord declined to accept the plaintiff as his tenant.

*TRIDAL, C. J.* It is perfectly indifferent whether the signature was on one side of the paper or the other, the whole being one transaction, the signature of the defendant applies to all that precedes it.

*Per curiam.*

Rule discharged.

(a) So, in the case of a sale of goods for ready money, the transaction being entire, it is immaterial whether the payment precedes, accompanies, or follows the delivery: neither does the delivery of the goods create a debt or raise an implied promise to pay the price: nor will the receipt of the money

support an allegation of a promise to deliver the goods. *Mary v. Barnett*, 9 M. & W. 311 1 Dowd N.S. 646. But, if goods be taken away with payment, a debt is created—promise to pay the price on demand, is implied. *Little v. Banks*, 7 Q. B. 730.



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June 9.

## TOOMER v. GINGELL.

A final order, under the 7 & 8 Vict. c. 96. s. 22., for the protection of an insolvent from being taken or detained under any process in respect of a debt included in his schedule, cannot be pleaded in bar; such order being a mere *personal* protection, and that statute containing no provision equivalent to the tenth section of the 5 & 6 Vict. c. 116.

**D**EBT, for goods sold, for work and labour, and money found due upon an account stated.

Second plea, as to 17*l.*, parcel &c., that the defendant being a trader within the statutes in force relating bankrupts, but owing debts amounting in the whole less than 300*l.*, and having resided for twelve calendar months then last past within the *London* district of bankruptcy, before the commencement of this suit, to wit, on the 30th of *October*, 1844, duly, and according to the form of the statute in such case made, presented a petition for protection from process to the court of bankruptcy, &c. (reciting it); that the said petition then had annexed thereto a full and true schedule of the debts, &c., and, amongst others, the said sum of 17*l.*, parcel &c., was stated and described as a debt in the said schedule; that the name of the plaintiff was therein described as a creditor, and the said petition and schedule were then verified by an affidavit, then duly sworn to by the defendant; that the said petition and schedule, with the said affidavit annexed, were then duly filed in the said court; that such proceedings were thereupon had in the said court of bankruptcy, that, afterwards, to wit, on &c., *C. Fane*, Esq., then being one of the commissioners of the said court of bankruptcy, duly authorised in that behalf, by his order in writing, under his hand made in the matter of the said petition, according to the form of the said statutes,—after reciting that the defendant had presented his petition for protection from process to the said court, and that the said petition had been duly filed in court, and that the defendant had duly appear



and been examined touching his debts, estate, and effects, and that it appeared to the said commissioner that the defendant, by virtue of the statutes in that case made and provided, was entitled to the protection of his person from being taken or detained under any process whatever, in respect of the several debts and claims therein-after mentioned, — a final order was thereby made, *to protect the person of the defendant* from being taken or detained under any process whatever, in respect of the several debts and sums of money due or claimed to be due from the defendant to the several persons named in his schedule as creditors, &c. ; and that the said sum of 17*l.*, parcel &c., and every part thereof, accrued due to the plaintiff before the filing of the said petition — verification.

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To this plea, the plaintiff demurred generally. The point stated in the margin was — that the plea afforded no answer to the action, the order therein set forth only protecting the person of the defendant from arrest or detention for the debts therein specified, and being no bar to an action for the recovery of them.

*Channell*, Serjt., in support of the demurrer. The plea is founded upon the statute 7 & 8 *Vict. c.* 96. The first section recites that it is expedient to amend the 5 & 6 *Vict. c.* 116. The second section gives the form of petition for protection from process (*a*). The third section provides for the notice to be given by the commissioner of the filing of the petition. The fourth section vests the property of the petitioner in the assignee or assignees.

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(*a*) The form in the schedule is silent as to the protection of the person from process: it merely states (besides the formal matter) that the petitioner “is desirous that his estate should be administered under the pro-

tection and direction of the court;” and prays “such relief in the premises as by the statutes now in force for the relief of insolvent debtors, may be adjudged by the court.”



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The sixth section states who may petition, and provide that “every such petitioner to whom an interim order for protection shall have been given, shall not only be protected from process, as provided by the said recited act (a), but also from being detained in prison in execution upon any judgment obtained in any action for recovery of any debt mentioned in his schedule;” and being in execution, may be discharged by order of the commissioner. By the twenty-second section it is enacted “that the final order to be made under the provisions of the said act, as amended by this act, *shall protect the person of the petitioner from being taken or detained under any process whatever* in the cases thereafter mentioned, that is to say, from all process in respect of the several debts and sums of money due, or claimed to be due, at the time of filing the petition, from such petitioner to the several persons named in his schedule as creditors, or as claiming to be creditors, for the same respectively, or for which such person shall have given credit to such petitioner before the time of filing such petition, and which were not then payable, or in respect of the claims of any other persons not known to such petitioner at the time of making the final order, who may be indorsees, or holders, of any negotiable securities set forth in such schedule:” and it provides for the form of such final

(a) Section 1., which provides, that, a petition being filed, “it shall be lawful for the judge or commissioner of the court of bankruptcy to whom, by any order of the court, as herein-after provided, the same shall be referred, or for the commissioner in the county to whom the petition shall be presented, to give, upon the filing of such petition, a protection to the petitioner *from all process*

*whatever*, either against his person or his property of every description, which protection shall continue in force, and all process be stayed, until the appearance of the petitioner in court as herein-after provided.”

The jurisdiction, except within twenty miles of London, is, from the 15th of September, 1847, transferred to the judges of the new county courts, by the 10 & 11 Vict. c. 102.



Order, which differs from that given by the commissioner under the 5 & 6 *Vict. c. 16.* in that it only professes to protect *the person* of the petitioner from being taken or detained under any process in respect of the debts due or claimed at the time of filing his petition; and does not proceed to direct a *distribution* of his estate and effects amongst his creditors. In *Cook v. Henson (a)*, this court held a plea — that, before the commencement of the suit, a petition for the defendant's protection from process was duly, and according to the form of the statute in such case made, presented by him to the court of bankruptcy; that, afterwards, and before action brought, a final order for protection *and distribution* was made in the matter of the petition, by *J. E.*, a commissioner of the said court, duly authorized in that behalf; and that the causes of action in the declaration were contracted before the date of filing the petition — was a sufficient plea in bar, within the 5 & 6 *Vict. c. 116. s. 10.* This, however, is not a plea under that section, the order here being for *protection* only. [*Tindal, C. J.* This clearly is not a good plea at common law: and, unless authorized by some statutory provision, it is no plea at all.]

*Talfourd, Serjt., contra.* Taking the two statutes together, this plea affords a good answer. [*Maule, J.* The tenth section of the 5 & 6 *Vict. c. 116.* makes a plea setting up a final order for *protection and distribution* a sufficient plea in bar: but there is no section in the 7 & 8 *Vict. c. 96.* that makes a final order for *protection of the person of the petitioner from being taken or detained under any process*, pleadable in bar.] The whole scope of the act points at a general distribution of the petitioner's estate amongst his creditors, to the ex-

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(a) *Ante*, Vol. I. p. 908.



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clusion of preference in favour of one. [*Maule, J.* may have been the intention of the last act, that, the assignee does not take steps to possess himself of after-acquired property of the insolvent, a creditor may.] That construction would make the insolvent liable for costs. The ninth section of the 5 & 6 *Vict. c. 116.* makes an order of the commissioner, or of a court of Review, necessary before the assignee can take possession of after-acquired property: and the seventh section of the 7 & 8 *Vict. c. 96.* enacts “that nothing herein contained shall be construed to repeal, affect, or in any manner alter, the provisions of the said recited act, except so far as herein above expressly provided, or except so far as the provisions of the said recited act may be inconsistent with, or at variance with the provisions of this act.” [*Maule, J.* That is not very operative section. It may have been the intention of the 7 & 8 *Vict. c. 96.* to take away the entire defence given under the former act, and to give protection to the person of the insolvent only, leaving his after-acquired property still subject to his debts.]

The court suggested, that, as the point was of considerable importance, the argument should be adjourned, in order to enable the learned serjeant to examine the statutes more minutely.

*Talfourd, Serjt.*, now said, that having carefully looked at the statute 7 & 8 *Vict. c. 96.*, he could find nothing therein to warrant him in asking the court to hold the plea good; and that he conceived the twenty-second section, which makes the final order a protection of the *person* only of the petitioner from being taken or detained under any process, to be conclusive of the question.



LE, J. It certainly seems to me that the intention of the legislature was, to restrict the protection of order to the *person* of the petitioner.

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rest of the court concurring,

Judgment for the plaintiff.

### EVANS v. WATSON and Another.

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was an action brought to recover the sum of 6*l.* 15*s.* alleged to be due from the defendants plaintiff on a charterparty by which the defendants agreed to load a vessel called the *General Wilt-Ichaboe*, with a cargo of guano. The cause was tried at the last summer assizes at *Liverpool*, postponed, at the instance of the defendants, on account of the absence of four or five witnesses, testimony was sworn to be material, and whom it was proposed to call for the purpose of proving misfeasance on the part of the captain of the vessel. On the 5th of *March*, 1846, the defendants obtained an order staying the proceedings on payment of debt and costs or before the 18th of *April*. Upon the taxation of costs, the plaintiff claimed a sum of 150*l.* 4*s.* 2*d.* for subsistence money paid to the captain, who had, on the advice of counsel, been detained in *England* during the 5th of *May*, 1845, in order to give evidence for the plaintiff. The master allowed 97*l.* 14*s.* 2*d.*, at the rate of 7*s.* per day for 300 days, deducting 7*l.* 5*s.* 10*d.*, which had been allowed to the captain during that period as a witness in another cause.

In an action for breach of a charterparty, the trial having been postponed at the instance of the defendants, the plaintiff detained the captain of the vessel in this country for a period of 300 days, having been advised by counsel that he could not safely examine him under the 1 *W. 4. c. 22.*, the defendants having intimated an intention to call witnesses to impugn his conduct : — Held, that, upon taxation

the plaintiff was entitled to subsistence money for the witness, during the period of his detention.



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*Byles*, Serjt., on a former day, obtained a rule nisi for a review of the taxation. He submitted that the captain ought to have been examined upon interrogatories under the 1 *W. 4. c. 22.*, instead of being detained so long for the purpose of giving his evidence *vivâ voce* and he cited *White v. Brazier*. (a)

*Channell*, Serjt., shewed cause. The master has exercised a sound discretion in allowing subsistence money for the witness in question. Such an allowance was sanctioned by the court in *Lonergan v. The Royal Exchange Assurance Company* (b), and *Mount v. Larkins*. (c) In *White v. Brazier*, also, the master allowed subsistence money for the captain of a vessel detained here as a witness from *August* to *November*: and the like was allowed, in the case of a master mariner, in *Berry v. Pratt* (d), from the service of the writ until the trial the court observing, that, unless detained for the purpose of giving evidence, the witness might again have gone to sea, and then the parties might have been put to a far greater expense by the postponement of the trial on account of his absence. (e)

*Byles*, Serjt., in support of the rule. It is not denied that the captain was a material witness, and that the plaintiff may have acted wisely in detaining him here. But the question is, whether it is reasonable that the defendants should be charged for his detention for so great a length of time. *Lonergan v. The Royal Exchange Assurance Company*, *Berry v. Pratt*, and *Mount v. Larkins*, occurred before the passing of the 1 *W. 4. c. 22.* In *Temperley v. Scott* (g), subsistence money

(a) 1 *Dowl. P. C.* 499.

(d) 1 *B. & C.* 276.

(b) 7 *Bingh.* 725., 5 *M. & P.* 447. 805., 1 *Dowl. P. C.* 223.

(e) See *Vice v. Lady Anson*, *Mood. & M.* 96., 3 *Carr. & P.* 19.

(c) 8 *Bingh.* 195., 1 *M. & Scott*, 357., 1 *Dowl. P. C.* 262.

(g) 8 *Bingh.* 392., 1 *M. & Scott*, 601.



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MAULE, J. I also think the allowance of subsistence money to the witness in this case was properly made. It cannot be laid down as a general rule, that, in cases where a witness may be examined on interrogatories, the party for whom he is to be called, may at his option detain him for examination *vivâ voce*. (a) But still he must be allowed a reasonable exercise of discretion; and, where the matter is doubtful, I think the party detaining him should have the benefit of the doubt. In the present case, I think the plaintiff would have acted most unwisely if he had not detained the captain, after the intimation given of the defendants' intention to impugn his conduct. The witness was a most important witness, necessarily kept for a reasonable time, part of it, indeed, at the instance of the defendants themselves, I therefore do not see any fair objection to the allowance which the master has made.

CRESSWELL, J. I am of the same opinion. In *Berry v. Pratt* (b), subsistence money was allowed for nearly as long a period as allowed here. But for the statute 1 W. 4. c. 22., the allowance here would have been quite of course. That, however, is an *enabling* statute; and I think it would operate very injuriously if it were to receive the rigorous construction that has been contended for by my brother *Byles*.

Rule discharged, with costs.

(a) And see *Patterson v. Anon.* (but S. C.) 2 D. & R. 424.  
*Evans*, 1 Chitt. Rep. 89.  
 (b) 1 B. & C. 276.; and see



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consideration of the said promise of the plaintiffs, and not otherwise; but that the said quantities of wool, the time when they were so offered and tendered delivery by the plaintiffs as in the said first count mentioned, were not equal in quality and description to the said sample, but, on the contrary thereof, the said were of a very inferior and bad and indifferent quality and description, and of much less value, and of no more value to the defendant; whereupon and wherefor the defendant then refused to accept the said wool, and pay for the same; as he lawfully might, &c. — verification.

To this plea the plaintiffs demurred specially, on the ground, amongst others, that it amounted to non assumpsit.

*Dowling*, Serjt., in support of the demurrer. The declaration alleges an absolute contract on the part of the defendant, to receive the wool, without any condition as to quality, or any specific description. The plea alleges that the contract was for a sale of wool, with a warranty that the bulk was equal to sample: that introduces a qualification into the contract, and amounts to a mere denial of the contract declared on: *Morgan v Pebrer* (a) *Nash v. Breeze* (b); *Heath v. Durant*. (c)

*Channell*, Serjt., *contra*. Had this been pleaded to a count in indebitatus assumpsit for goods sold and delivered, or goods bargained and sold, the plea would undoubtedly have been open to the objection suggested. But the difficulty here arises from the new rules, which provide that the plea of non assumpsit shall operate only as a denial in fact of the express contract.

(a) 3 N. C. 457., 4 Scott,  
230.

(b) 11 M. & W. 352.  
 (c) 12 M. & W. 438.



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## HOLLIER v. LAURIE, CHAPMAN, and TODD.

June 12.

Goods seized by the sheriff under a *fi. fa.* against *A.*, out of the court of Exchequer, were claimed by *B.*, to whom they were restored upon the establishment of her right upon an issue directed, at the sheriff's instance, under the interpleader act. *B.* afterwards brought *trespass* against the sheriff(a), for breaking and entering her house, on the occasion of the seizure : — This court refused to stay the proceedings —

holding the relief and protection afforded to the sheriff by the 1 & 2 W. 4. c. 58. s. 6. to be confined to disputed claims to the goods seized, or to their proceeds.

And, *semble*, that, if the proceeding in this court were a violation of the interpleader order, the application for relief should have been made to the court in which the interpleader took place.

ON the 7th of *March* last, a writ of *fi. fa.* issued out of the court of *Exchequer*, at the suit of the defendant *Todd*, against one *Charles Maggi*, indorsed to levy 20*l.* 2*s.* 7*d.*, &c., and a warrant was granted thereupon by the other defendants, as sheriff of *Middlesex*. The officer entered residence of *Maggi* to make a seizure. The plaintiff, a lodger, having claimed part of the goods, the officer, on the 12th, took out a summons under the interpleader act. The summons was attended on the 14th, by the attorneys for the claimant, the execution-creditor, and the sheriff, when the following order was made by *Cresswell, J.* : —

“ Upon hearing, &c., I do order, that, upon payment of the sum of 30*l.* into court by the said claimant, within a week from this date, or upon her giving, within the same time, security, to the satisfaction of one of the masters, for the payment of the same amount by the said claimant according to the directions of any rule of court or judge's order to be made herein, and upon payment to the said sheriff of the possession money from this date, the said sheriff do withdraw from the possession of the goods and chattels seized by him under the writ of *fi. fa.* issued herein : And I do further order, that, unless such payment shall be made, or such

(a) The execution-creditor was made a co-defendant ; upon what ground, it does not appear.



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**LAWRIE.**

costs of and occasioned by the interpleader application and also the costs of the said *Mary Hollier* of, and occasioned by, and incident to, the issue by the said order directed to be tried, and the costs of this application be taxed, including 1*l.* 10*s.* paid by the said claimant the sheriff of *Middlesex* for possession money, the issue having been tried, and a verdict found for plaintiff therein."

The costs of *Mary Hollier* were afterwards taxed 35*l.* 6*s.* 2*d.*, and duly demanded of *Todd*; but, on account of his extreme poverty, she was unable to obtain them.

The present action was brought by *Mary Hollier* against the sheriff of *Middlesex* and *Todd*, the execution-creditor, for the alleged trespass in breaking and entering the rooms in her occupation, and seizing her goods, under colour of the writ against *Maggi*.

*Channell*, Serjt., on behalf of the sheriff, on a former day in this term, obtained a rule nisi to stay the proceedings, as being an evasion of the interpleader order.

*Byles*, Serjt., now shewed cause. The statute 1 & 2 W. 4. c. 58. s. 6. authorises the court or a judge to stay the proceedings in any action brought by a claimant in respect of goods seized by the sheriff; but it relates solely and entirely to the seizure of the goods. Here, the claimant has succeeded, under the interpleader rule, in establishing her right to the goods. But, besides seizing her goods, the sheriff broke and entered her dwelling-house: this was a distinct and substantive act of trespass, in respect of which she has a clear right of action. The court has no power to interpose: and if it had, this is not a case in which it would be disposed to exercise it. Besides, it may well be doubted whether the application should not have been



made to the court of Exchequer, where the original action was brought, and in which the interpleader issue was tried.

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Sir *T. Wilde*, and *Channell*, Serjts., in support of the rule. The intention of the statute 1 & 2 *W. 4. c. 58.* was, to afford substantial protection to public officers in the execution of their duties. The sixth section recites, that “difficulties sometimes arise in the execution of process against goods and chattels, issued by, or under the authority of, the courts, by reason of claims made to such goods and chattels by assignees of bankrupts and other persons, not being parties against whom such process has issued, whereby sheriffs and other officers are exposed to the hazard and expense of actions, and it is reasonable to afford relief and protection in such cases to such sheriffs and other officers;” and enacts, that, “when any such claim shall be made on any goods or chattels taken, or intended to be taken, in execution under any such process, or to the proceeds or value thereof, it shall and may be lawful to and for the court from which such process issued (*a*), upon application of such sheriff or other officer, made before or after the return of such process, and as well before as after any action brought against such sheriff or other officer, to call before them, by rule of court, as well the party issuing such process as the party making such claim, and thereupon to exercise, for the adjustment of such claims, and the relief and protection of the sheriff or other officer, all or any of the powers or authorities hereinbefore contained, and make such rules and decisions as shall appear to be just, according to the circumstances of the case;” and that “the costs of all such

(*a*) Extended to judges of any of the courts, by 1 & 2 *Vict. c. 45. s. 2.*



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proceedings shall be in the discretion of the court. The sheriff having in this case, in the execution of the process of this court, seized certain goods, a third party lays claim to them; whereupon the sheriff obtains an order under the statute, under which the goods are, upon terms, restored to the claimant, and an issue is directed, and eventually the claimant's right is established. She now brings an action for an alleged trespass incidental to the seizure of the goods under the execution. This is precisely one of the difficulties against which the statute intended to protect the sheriff. When the claimant appeared before the judge to support her claim to the goods, if she had intended to reserve to herself a right of action against the sheriff for the trespass committed in making the seizure, she should have asked the judge to make a special order to that effect [*Cresswell, J.* Could the judge compel the execution-creditor to be defendant in an action of trespass for breaking and entering the rooms?] Probably not. The interpleader order, however, has defined the rights of the parties; and it is as much an abuse of the process of the court to proceed in this way, as it would be, after a rule for staying the proceedings in an action in one court, to bring a fresh action in another. [*Cresswell, J.* Suppose the sheriff, under colour of an execution against the goods of *A.*, enters the house of *B.*, and there seizes goods belonging to *C.*, would the sheriff, by an interpleader rule, obtained in respect of *C.*'s claim to the goods, deprive *B.* of his right to complain of the trespass done to him?] Probably not. But here the action is brought by the party claiming the goods, and not, as in the case supposed, by a third person. The sheriff has acted *bonâ fide*, and the act complained of is inseparably connected with the duty he had to perform. If the sheriff is not protected under circumstances like the present, the provisions of the statute will in most



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ings. The statute, as it seems to me, only intended to provide for cases of daily occurrence, claims set up by third persons to goods taken in execution. The case, however, of the sheriff entering the wrong house — and this is the same as if it had been the separate house of the plaintiff; being her *domus mansionalis* (a) — is not one of very frequent occurrence; and I cannot think it one to which the statute ever meant to apply a remedy. I therefore think this rule must be discharged.

COLTMAN, J. It appears to me also that the sheriff is not entitled to the relief he seeks. I do not see that in bringing this action, the plaintiff has been guilty of any violation of the order of my brother *Cresswell*. The court of Exchequer is the proper tribunal to vindicate its own, if any contempt of its rule or order has been committed. That which the interpleader act was intended to remedy, was, the inconvenience to which sheriffs and others were sometimes put, by claims being set up by strangers to goods seized in execution; it never was intended to relieve them from the consequences of improperly entering the house of one man to seize the goods of another. Whether the circumstances will afford the sheriff a defence, it is not necessary to discuss.

MAULE, J. I also think this rule must be discharged. In the first place, it appears to me that this court has no jurisdiction in the matter under the interpleader act. There is no doubt, under the terms of the act, where an action is brought, and a third party sets up a claim, the defendant having no interest in the subject-matter, the application must be made to the court in which the action is brought. So, in the case

(a) See *Sheers v. Brooks*, 2 H. Blac. 120.



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extending to the common law courts a jurisdiction that had been found convenient in courts of equity, that is, where a man is willing to do or omit what he is called upon to do, by one party, and to omit, by another, and confesses his liability to one or other of them, — to relieve him from the hardship of disputing with both, and allow the parties really interested to contest the matter between themselves. The sheriff is in a position analogous to that of such a defendant. The execution creditor requires him to execute the process of the court against the goods of his debtor: having seized certain goods which he believes to be the goods of the debtor, the sheriff is met by the claim of a third party who insists that the goods are his, and that he will hold the sheriff responsible for seizing them. That is, in effect, the recital of the 1 & 2 W. 4. c. 58. s. 6.; and the enactment limits it to the case of any claim “made on any goods or chattels taken, or intended to be taken, in execution under any such process, or to the proceeds or value thereof.” In a subsequent part of the clause, it is true, power is given to the court to make “such rules and decisions as shall appear to be just, according to the circumstances of the case;” but that means according to the circumstances of the case *in which the act confers the jurisdiction*. To extend those words to cases in which jurisdiction is not previously given, would be to give them too large a latitude: it would be making the superstructure much wider than the foundation. It is quite clear that an action for breaking and entering the house of a third party, in the execution of process, is no more within the contemplation of this act than an assault and battery of the party would be. It cannot be said that the damages in such an action are something as to which the sheriff doubts who is entitled to them. He is here charged as a wrongdoer: there is nothing to interplead about; nobody but himself is in-



interested in the result, or liable for the consequences. It is conceded, that, if the breaking and entering the house had been the sole cause of complaint, the interpleader act would have been out of the question. It would be somewhat singular if the situation of the plaintiff should be prejudiced by the circumstance of her having sustained an accumulation of wrongs.

In every view, therefore, I think the rule is answered.

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CRESSWELL, J. I am of the same opinion. The intention of the legislature, as it seems to me, was, to afford relief to the sheriff only in cases where claim is made to goods seized under process, and not where compensation is sought for a trespass. In the case of goods, the claimant, if his claim be well founded, is compensated for their seizure, by having them restored to him: but, for a trespass in breaking and entering his house, it is only by recovering damages that he can be compensated. A judge before whom the parties appear under an interpleader summons, has no power to make the execution-creditor take upon himself any responsibility for breaking and entering the claimant's house. The mischief recited and intended by the act to be remedied, is confined to the difficulty in ascertaining the true ownership of the goods; and it is to that alone that the order is confined. The protection of the sheriff is not to be extended beyond relief from the difficulties recited. The earlier sections of the 1 & 2 W. 4. c. 58. shew the class of cases to which the act was intended to apply: in s. 1. the only actions mentioned are, assumpsit, debt, detinue, and trover — all shewing that disputes relating to *goods* alone are contemplated, where the defendant is a mere stakeholder, claiming no interest himself. If any thing beyond a claim to goods, or their proceeds, is involved, the act does not apply. In *Law-*



1846. *rence v. Matthews (a)*, the declaration containing  
 ——— in case as well as a count in trover, *Coleridge*,  
 HOLLIER that no relief could be afforded under the act.  
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Rule discharged, wit

(a) 5 Dowl. P. C. 149.

June 12.

### WRIGHT v. BURROUGHES, BERKELEY, and L

A pauper plaintiff having, behind the back of his attorney, and under circumstances shewing a desire on his part to deprive him of his costs, agreed with the defendants, in an action for unliquidated damages, to execute a release, and the defendants having pleaded such release *puis darrein con-*

**T**HIS was an action of trespass for breaking entering the plaintiff's house, and seizing & carrying away his goods. The defendants pleaded pleas, upon some of which issues were joined. A trial had been given for the last summer at *Surrey*, but, in consequence of the absence of witnesses, the record was withdrawn. To the rejoinder and replication to one of the pleas pleaded by *Burroughes* and *Berkeley*, there was a demurrer, and, after the demurrer had been set down for argument, viz. 22nd of *April*, 1846, the defendants *Burroughes* & *Leader* delivered a plea of release *puis darrein continuance*.

*C. Jones*, Serjt., on behalf of the plaintiff's attorney, moved for the plaintiff having *pendente lite* been allowed to plead *formâ pauperis* — on the 8th instant, moved for

*continuance* — the court, at the instance of the attorney, set aside the plea.

The plea was delivered on the 22nd of *April*: the motion to set it aside was not made until the 8th of *June*: — Held, not too late, it not being an irregularity.

*Quære*, whether it is competent to a defendant to plead a release *puis darrein continuance* after a demurrer to his rejoinder to a replication to one of the pleas originally pleaded to the action.



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may be, upon the mere chance of succeeding in the action. Surely he is not in the situation of an ordinary plaintiff. *Tindal*, C. J. It is the *spes spoli* alone that induces the attorney to undertake the conduct of a pauper cause.] The learned serjeant then submitted that the application was too late, the plea having been pleaded on the 22nd of *April*, and the rule not moved for until the 8th of *June*.

*C. Jones*, Serjt., in support of the rule, submitted that that which was complained of was not a mere irregularity; that, if it were so, the circumstances entitled the attorney to more than ordinary indulgence, seeing that he could not deal with such a plea as this without taking the advice of counsel; and that the affidavits disclosed evident collusion between the parties to deprive the attorney of all chance of repaying himself the expenses he had been put to in the conduct of the suit. (a)

TINDAL, C. J. I will not say that cases may not arise in which it may be lawful for a pauper plaintiff to settle with the defendant, without regard to his attorney's lien. But it must be a very strong case that will justify such a course. The attorney who is appointed by the court to carry on the pauper's cause, builds all his hopes of remuneration for his expense of time and money, upon his success against his adversary. A release destroys those just hopes. I think it is by no means desirable that the position of an attorney in a pauper cause should be made such as that no creditable person could be expected to accept it. This is not a mere matter of irregularity; and therefore the delay in making the application is not of so very much consequence.

(a) The affidavit upon which the motion was founded, stated that the attorney had expended more than 30*l.* of his own money.



The rest of the court concurring,

Rule absolute.

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*C. Jones*, Serjt., then prayed that the court would order the release to be delivered up to be cancelled.

TINDAL, C. J. The plea having been taken off the file, the defendants cannot again avail themselves of the release. (a)

(a) i. e. in that action.

### FINDLEY v. HARRIET FARQUHARSON.

June 12.

THIS was an action brought to recover a balance of 32l. due on two promissory notes. The defendant pleaded, in person, that, at the time of making the supposed promises and contracts in the declaration mentioned, she the defendant was, and still is, the wife of one *E. A. Farquharson*. Issue being joined on a traverse of this plea, the cause was tried at the first sitting at *Westminster*, in *Easter* term last, when a verdict was found for the defendant.

Where a married woman obtains a verdict upon a plea of coverture pleaded by her in person, she is entitled to a taxation of her costs out of pocket.

Judgment having been signed, and notice of taxation given, it was objected, on the part of the plaintiff, that the defendant, being a married woman, and having appeared and pleaded in person, was not entitled, by the practice of this court, to any costs. The master having declined to proceed with the taxation,

*Dowling*, Serjt., on a former day, obtained a rule calling upon the plaintiff to shew cause why the master should not tax the defendant her costs. He submitted that there could be no reason why a married woman, appearing in person, should not be allowed costs, like



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 ———  
**FINDLEY**  
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**SON.**

any other successful defendant; and he stated it to the practice of the courts of Queen's Bench and Exchequer in such cases to allow costs out of pocket.

*Byles*, Serjt., shewed cause. The defendant, as a married woman, would not have been liable for costs (a); neither can she be entitled to receive them. [*Maule* If she has separate property, she will be liable.] There is no suggestion that this defendant has any separate property. In *Wortley v. Rayner* (b), it was thought necessary to join the husband, in order to obtain costs.

*Dowling*, Serjt., was not called upon to support the rule.

**MAULE, J.** An ordinary person gets costs without appearing by attorney; and I see no reasonable distinction in the case of a married woman.

**TINDAL, C. J.** Let the master proceed with the taxation, on the principle adopted in the other courts.

Rule absolute accordingly.

(a) *Sed vide Beynon v. Margaret Jones*, 15 M. & W. 566.

(b) 2 Dougl. 637.

END OF TRINITY TERM.



1846. The demise in the declaration was laid on the 1st  
 ——— November, 1843.

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The following case, under a judge's order, and consent, was stated for the opinion of this court : —

*Thomas Morgan*, being seised in fee-simple of ■ estates in question, duly made and executed his ■ bearing date the 26th of *November*, 1795; and, a■ thereby devising the estates in question (situate *Llanellen* and *Llanover*) to his son *Samuel Morgan* (since deceased, without issue), for his life, without im peachment of waste, with a limitation to trustees in the said will named, and their heirs, during his life, upon the usual trusts to support contingent remainders, and a charge of an annuity of 20*l.* to the testator's daughter *Ann Llewelin* (since deceased) for her life; with remainder, from and after the decease of the said *Samuel Morgan*, to the first and all and every the son and sons of the said *Samuel*, severally and successively and according to seniority, in tail general; with remainder to the use of all and every the daughter and daughters of

body and bodies, to take as tenants in common, and not as joint tenants;" and, for want or in default of such issue, to all and every the daughter and daughters of the four grandchildren, in like manner: "and, in case either of my said grandchildren *B.*, *C.*, *D.*, and *E.*, shall happen to die leaving no issue behind him, her, or them, then *my will and meaning is*, that all and singular the premises herein lastly devised, shall go and remain to the survivor of them, and the heirs of his or her body lawfully to be begotten, *in manner aforesaid*; and, on failure of issue of either of their bodies lawfully begotten, then I give, devise, and bequeath the same premises to the use of the children of my brothers *F.* and *G.*" &c.

The testator's grandson *C.* survived his brothers and sisters, and entered into possession, the testator's son, and his grandson *A.*, having both died without issue : —

Held, that *C.* took an estate for life only; the effect of these words — "*shall go and remain to the survivor of them, and the heirs of his or her body lawfully to be begotten in manner aforesaid,*" being, to bring the lands, in the event to which the clause in which they were found applied, within the preceding clause, which gave life estates to the grandchildren, with remainders in tail to their sons and daughters; and there being no other part of the will to which the words of reference, "*in manner aforesaid,*" could be applied.



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their body and bodies lawfully issuing, to take as tenants in common, and not as joint-tenants; and, want or in default of such issue, to the use of all and every the daughter and daughters of the bodies of said grandchildren, *William, Samuel, Alice, and Hannah*, lawfully to be begotten, and the heirs of the body of such daughters respectively lawfully issuing, daughters of each of my said grandchildren, *William, Samuel, Alice, and Hannah*, if more than one, to take as tenants in common, and not as joint-tenants; and in case of the death and failure of issue of any one or more of the said daughters of my said grandchildren, all and every the share and shares of her or them so dying when and so often as it shall so happen, shall go, remain, and enure to the survivor and survivors and others of the said daughters, and the heirs of the body and bodies of such surviving and other daughters and daughters respectively, such surviving daughters if more than one, to take also in equal parts and shares as tenants in common, and not as joint-tenants; and, if all such daughters but one shall die without issue, or if there shall happen to be but one daughter of the body of my said grandchildren lawfully to be begotten, then to the use of such only surviving daughter, and the heirs of her body lawfully issuing: And, in case either of my said grandchildren, *William, Samuel, Alice, and Hannah*, shall happen to die leaving no issue behind him, her, or them, then *my will and meaning is*, that all and singular the premises herein lastly devised, shall go and remain to the survivor of them, and the heirs of his or her body lawfully to be begotten, in manner aforesaid; and, in failure of issue of either of their bodies lawfully begotten, then I give, devise, and bequeath the same premises to the use of the children of my brother *Charles Morgan and James Morgan*, in manner follow



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estate at *Guiclog* to his grandson *Samuel Llewelin*, for his life, without impeachment of waste, with a limitation to the said trustees, and their heirs, during his life, upon the usual trusts to support contingent remainders; with remainder, immediately after the death of the said *Samuel Llewelin*, to the use of his first and all and every other his son and sons successively and according to seniority, in tail general; with remainder to the use of all and every his daughter and daughters, in tail general, if more than one, as tenants in common, with cross-remainders between them in tail general: and the said testator then proceeded in the words following:—

“And, in failure of or in default of any such issue, to the use and behoof of the brothers and sisters of my grandson *Samuel Llewelin* then living, and the heirs of their bodies lawfully issuing, share and share alike, to take as tenants in common, and not as joint-tenants; and, from and after the several deceases of his brothers and sisters, and their lawful issue, and the survivor of them, then I give, devise, and bequeath the said last-mentioned premises to the children of my two brothers, *Charles* and *James Morgan*, their heirs and assigns for ever, in like manner and form as the premises hereinbefore devised to them in remainder.”

The testator also then devised an estate at *Abergavenny* to his grand-daughters *Alice Llewelin* and *Hannah Llewelin*, for their lives, as tenants in common, without impeachment of waste — with a limitation during their lives to the said trustees, and their heirs, upon the usual trusts to support contingent remainders; with remainder, from and immediately after the decease of his said granddaughters *Alice* and *Hannah*, and the decease of the survivor of them, to the use of the first and all and every the son and sons of the body and bodies of his same granddaughters, severally and successively and according to seniority, in tail general;







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 DOE dem.  
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mainders between them in tail general. The testator then proceeded, in the words following: —

“And, in failure of or in default of any such issue, the use and behoof of the brothers and sisters of said *Thomas Llewelin*, then living, and the heirs of their bodies lawfully issuing, share and share alike, to take as tenants in common, and not as joint-tenants; and from and after the several deceases of his brothers and sisters, and their lawful issue, and the survivor of them then I give, devise, and bequeath the last-mentioned premises to the use of the children of my brother *Charles* and *James Morgan*, their heirs and assigns forever, share and share alike, and to and for no other use, intent, or purpose whatsoever, in like manner and form as the premises hereinbefore severally devised to them in remainder.”

The testator then, by his said will, after giving power of leasing to his son, grandsons, and granddaughters as therein mentioned, and making certain specific and pecuniary bequests out of his personal estate, gave, devised, and bequeathed all the rest and residue of his real and personal estate, whatsoever and wheresoever whereof he should die possessed, unto his grandson *Thomas Llewelin*, subject to the payment of the testator's just debts and funeral expenses; to hold to him the said *Thomas Llewelin*, his heirs and assigns forever. And he appointed him sole executor of his will

[An entire copy of the will was set out in an appendix to the case, to which copy either party was to be at liberty to refer on the argument of the case.]

The testator died on the 11th of *June*, 1797, leaving his said son *Samuel Morgan*, his heir-at-law, and his said grandchildren *Thomas*, *William*, *Alice*, and *Hannah Llewelin*, him surviving.

The testator's son *Samuel Morgan* died in 1809 bachelor, and intestate as to any reversion in fee,



other interest, if any, in the estates in question which descended to him as undisposed of by the said will. He left his sister *Ann Llewelin*, widow, his heir-at-law.

The said *Ann Llewelin* died in *December*, 1841, intestate, leaving the said *Samuel Llewelin* (one of the testator's grandsons) her eldest surviving son and heir-at-law.

The testator's grandson *Thomas Llewelin* died in *September*, 1829, a bachelor and intestate, and leaving his surviving brother, the said *Samuel Llewelin*, also his heir-at-law.

Before this period, the testator's grandson *William Llewelin*, and his granddaughters *Alice* and *Hannah Llewelin*, had all died without having had any issue, viz. *William* in the year 1815, *Alice* in the year 1823, and *Hannah* in the year 1810.

*Samuel Llewelin*, the only surviving grandchild, entered into possession of the estates on the death of *Thomas Llewelin*, in 1829.

In the year 1838, the said *Samuel Llewelin* executed disentailing deeds, under the act for abolishing fines and recoveries (*a*), viz. indentures of lease and release (and which were afterwards duly inrolled according to the said act); and by such indentures he bargained and sold and released and conveyed the estates in question unto *William Woodhouse Secretan*, and his heirs, to the use of himself the said *Samuel Llewelin*, his heirs and assigns for ever.

By his will, dated the 25th of *June*, 1840, and duly made and attested, the said *Samuel Llewelin* devised all his real estate to the defendants, as tenants in common in fee, and died a bachelor on the 9th of *September*, 1842, leaving the lessor of the plaintiff, *Hannah Woodall*, his heir-at-law.

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(a) 3 & 4 W. 4. c. 74. s. 3.



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[A copy of the will of *Samuel Llewelin* was also contained in the appendix to the case, and either party was to be at liberty to refer to it on the argument.]

*Charles Morgan*, the next eldest brother of the testator *Thomas Morgan* (and who had died some years before the date of the said will), had a daughter named *Hannah*, his only child, who married *Thomas Lewis* and died intestate, in the year 1810, leaving an only child, *Hannah*, one of the lessors of the plaintiff, the wife of *William Woodall*, one of the lessors of the plaintiff and mother of the defendant *Thomas Lewis Woodall*.

*James Morgan*, the other brother of the testator *Thomas Morgan*, died in 1808, and had one child only, *James Jones Morgan*, one of the lessors of the plaintiff, who was born in the year 1775, and is the father of the defendant *James Jones Morgan* the younger.

It is contended, on the part of the plaintiff, that, on the death of *Samuel Llewelin*, a bachelor, *Hannah Woodall*, one of the lessors of the plaintiff, became entitled to two undivided thirds, in tail; and *James Jones Morgan*, one of the lessors of the plaintiff, to the remaining undivided third, in tail. And, if the court shall be of this opinion, it is agreed that a judgment shall be entered for the plaintiff accordingly.

But it is contended, on behalf of the defendants, that the lessors of the plaintiff did not become so entitled. And, if the court shall be of this opinion, it is agreed that judgment shall be entered for the defendants.

The case was argued in *Michaelmas* term last.

*Channell*, Serjt. (with whom was *Talfourd*, Serjt.), for the plaintiff. (a) Under the will of *Thomas Morgan*, the

(a) The points respectively marked for argument, were as follow: —

For the plaintiff — That

*Samuel Llewelin* took only a tenant for life, and that, on his death, a bachelor, *Hannah Woodall*, one of the lessors



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the survivor of them, and the heirs of his or her body lawfully to be begotten, in manner aforesaid" — in the events which have happened, created an estate-tail in *Samuel Llewelin*. But the words "in manner aforesaid" shew the testator's intention that the survivor should take subject to the previous limitation, the language of which is somewhat different from that last referred to: he did not mean to alter or to interpret, but only to refer to, the previous disposition; and under that the grandchildren clearly took for life only: *Cursham v. Newland*. (a) In *Watson v. Foron* (b), the testator, after giving estates for life to *A.* and *B.*, devised "all and every the said premises to all and every the younger children of *B.*, begotten or to be begotten, if more than one, equally to be divided amongst them, and to the heirs of their *respective* body and bodies as tenants in common, &c., and, if only one child, then to such only child and to the heirs of his or her body issuing;" and, "for want of such issue," he devised "the said premises to *C. N.*," &c., with several limitations over; and, "for want of such issue," he divided the said premises between several branches of his family. It was held that cross-remainders were to be implied between the younger children of *B.*, from the apparent intention of the testator from the whole of the will, notwithstanding the use of the word *respective* in such devise. So, in *Livesey v. Harding* (c), the Master of the Rolls (Sir *J. Leach*) says: "Where there is a gift to two persons only, and the heirs of their bodies, cross-remainders will be implied, although there is no expressed intention that no part of the estate shall go over until the failure of issue of both, unless the limitation to them be successively, severally, or respectively, and then the remainders over will be several and *respective*." Here, there is no

(a) 2 N. C. 58., 2 Scott, 105.

(b) 2 East, 36.

(c) 1 Russ. & M. 636.



ly to resort to cross-remainders by implication, as cross-remainders are expressly given. The testator clearly did not intend that the children of his wife should take any interest, until after a failure of issue to all the four grandchildren.

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by Serjt. (with whom was *H. G. Jones*, Serjt.), for the defendants. At the time of the testator's death in 1842 the state of his family was this:—He had one son, *Samuel*, and a daughter, *Ann*, who was married and had four children—*Samuel*, *Thomas*, *William*, *Alice*, and *Hannah*. The son of the testator died in 1803. The daughter died in 1841. Of her children, *Hannah* died in 1815, *Alice* in 1823, and *Thomas* in 1838. *Samuel*, who survived, entered into possession of the property, and, in 1838, executed disentailing deed, limiting the estate to himself in fee-simple. He died in 1842, having by his will devised his estate to his four children as tenants in common in fee. The question for the consideration of the court, is, whether *Samuel*, under the will of his grandfather *Thomas Morgan*, by the events which have happened, took an estate in fee or for life only. After the devise to his four children, for life, with remainders in tail to their sons and daughters, the testator proceeds—“And, in the event of my said grandchildren, *William*, *Samuel*, and *Hannah*, shall happen to die, leaving no issue behind him, her, or them, then my will and meaning is, that all and singular the premises herein lastly devised, shall go and remain to the survivor of them, or to the heirs of his or her body lawfully to be begotten, or to the heirs aforesaid.”

*William* and *Hannah Woodall* clearly have no title. *Hannah* was the daughter of *Charles Morgan*, the next brother of the testator *Thomas Morgan*; and she died in 1810, and therefore was not living at the death



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and failure of issue of the four grandchildren living at date of the will. [*Maule*, J. What do you say to the other lessors of the plaintiff?] If *Samuel Llewelin* took for life only, then they will be entitled, the one set to two thirds, the other to one third of the estate.

*Samuel Llewelin*, however, clearly took an estate-tail. The words used "to the survivor of them, and the heirs of his or her body lawfully to be begotten," are the formal and proper words to create an estate-tail. The burthen of shewing that they were intended to have a contrary meaning, rests upon the other side. The question is, whether the word "heirs" is to be taken as a word of purchase or of limitation. The leading case in modern times upon this subject, is that of *Lee v. Mosley*. (a) There, the testator devised as follows: "I give and devise all that my freehold lease of a farm in *Prestbury*, and all and every my chief rents in the town of *Manchester*, and also my two warehouses in the said town, unto my two sons *Henry James*, and *Oswald*, in moieties, as tenants in common, and not as joint-tenants, in such manner, and subject to such charges, as hereinafter mentioned (that is to say), as to one moiety or equal half part thereof to my son *Henry James* for life, with remainder to his lawful issue, and their respective heirs, in such shares and proportions, and subject to such charges, as he the said *Henry James* shall by deed or will appoint; but, in case my son *Henry James* shall not marry and have issue who shall attain the age of twenty-one years, then to my son *Oswald* in fee:" and it was held that *Henry James* took an estate for life in the moiety, with remainder to his children as tenants in common *in fee*; for, that whatever be the *primâ facie* meaning of the word "issue" in a will, it is not a technical expression, and

(a) 1 *Younge & C.* 589.



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will yield to the intention of the testator, to be collected from the words of the will; and therefore it requires a less demonstrative context to shew the testator's intention in regard to the word "issue" than in regard to the technical expression "heirs of the body." In the very learned and elaborate judgment delivered by *Alderson, B.*, in that case, it is said: "It has long been settled, that, in construing devises, the governing principle is the intention of the testator, to be collected from the words of the will itself. In order to ascertain that intention, however, the courts have adopted rules which, no doubt, it is very desirable should be as clearly and distinctly laid down as possible, and generally acted upon. And, with this view, it is often far better that the particular objects of individual testators should occasionally be frustrated, rather than that there should be a general uncertainty in the titles to real estates, productive, as such uncertainty always must be, of expense, and presenting, as it must in many cases do, obstacles to the easy transmission of landed property from one purchaser to another. But, in endeavouring to attain this laudable object, the courts must take great care, and exercise much watchfulness, lest from a mere love of generalisation they shake titles already existing, with a view to future and theoretical good. Upon a careful examination of the authorities, we think that it may be safely laid down as a rule, that, in a devise, technical words, or words of definite meaning, shall always be construed according to their legal or definite effect, unless, from other inconsistent words in the will, it be quite clear that they are used in some other definite sense. Thus, if the words 'heirs of the body,' — which are technical words, properly admitting only of one meaning, — are used, it becomes necessary to shew affirmatively that the testator meant clearly to use them as words of purchase; or, more correctly, as words



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descriptive, not of all the descendants of the body, but of one definite class only of such descendants. *It is enough to raise a reasonable doubt whether he intended to use them as words of limitation, or to shew a probable conjecture that he intended to designate children only by the phrase.*" And, after referring to *Jesson v. Wright* the learned baron proceeds: "Another instance of application of the rule with which we began, may be found in that class of cases in which 'sons' or 'children,'—which in their proper sense are words of purchase,—have been held to be words of limitation. There, in like manner, it must be demonstrated from the will, affirmatively and clearly, that, by these expressions, the testator meant all the descendants of the body to take as heirs. There is, however, a third class of cases, where a testator uses in his will an expression, in its ordinary use not of a technical nature, and capable of more meanings than one. Now, here, the investigation takes a different course. It will be merely directed to the solution of the question in what sense the testator intended to use the expression, and to ascertain whether the evidence preponderates in favour of the one rather than the other meaning or meanings of the word in question; regard being always had to the *prima facie* sense, or to that in which the word is most ordinarily used, in weighing the evidence contained in the will upon which the court is ultimately to decide. The first point, therefore, to be considered is—whether 'issue' be a word of this nature. Now, we think that this sufficiently appears, from referring to the various authorities." He then refers to the statute *De Donis* (b), where "issue" is used, to denote, sometimes children, and sometimes all the descendants, according to the

(a) 2 *Bligh*, 1., 5 *M. & S.*  
 95.; overruling *Doe d. Strong*  
*v. Goff*, 11 *East*, 668.

(b) 13 *Ed.* 1. c. 1.



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*daughters*, and the heirs male of her body, should always be preferred and to take before the younger of the same daughters, and the heirs male of her and their bodies. There were other clauses in the will, which, after giving an estate for life to the first taker, the testator limited to trustees, &c.; remainder to the first and other sons of such first taker, and the heirs of their bodies, so as the elder of such sons, and the heirs of their bodies, should always be preferred before the younger of the same sons, and the heirs male of their bodies. And it was held, that the first son of the testator took an estate-tail — there not appearing, upon the whole will together, sufficient indication of the testator's intention to restrain the legal effect of the words "heirs male of the body," and to convert them into words of purchase. In intimating the opinion of the court, Lord *Alvanley* there said: "It is contended, that according to the rule which has prevailed in cases of this kind, it must be holden that the testator meant to restrain the general sense of the words 'heirs male' and not to employ them as words of limitation. I do not give any opinion, whether, if this clause had stood alone, unexplained by other parts of the will, it might not have been the proper construction. (At this point the court wish to avoid any determination) In the deed, if this had been a single limitation to a son, the construction would have depended much upon the liberality with which the judges might be disposed to consider it. But it appears to me, that, in cases of limitations of this sort, the courts have never departed from the general rule, which gives an estate to the first taker where the devise to him is followed by a limitation to the heirs of his body, except where the intent of the testator has appeared so plain and contrary that no one could misunderstand it. In the present case, however, when the limitation upon w



es is connected with the other limitations, in  
 has used the same words clearly without in-  
 at the heirs of the body should take by pur-  
 would be strange to suppose he intended the  
 is limitation to take as purchasers. I take the  
 ecting the construction of words in wills to be  
 well settled. Words are always to be taken  
 rdinary sense, unless the testator has demon-  
 intention to put a different sense upon them.  
 words employed in the first devise are clearly,  
 rdinary sense, words of limitation. Another  
 construction of wills, is, that neither an intent  
 l by the testator to give only an estate for life,  
 interposition of trustees to preserve contingent  
 s, nor mere words of condition describing the  
 succession in which the devises are to take  
 the introduction of powers of jointuring, or  
 to commit waste, are of themselves sufficient  
 e technical sense of the words used. It must  
 pear that the testator did not mean to give  
 state as would pass under the words used, un-  
 olled by such apparent intent. My brothers  
 me in thinking that this rule must be rigidly  
 So, in *Douglas v. Congreve* (a), under a  
 lands to M. S. for life; with the use of house-  
 s, &c.; remainder to J. S. for life; remainder  
 s of the heirs of the body of M. S. in tail;  
 over in succession to divers persons for life,  
 heirs of their bodies respectively in tail; *the*  
*limitations to be in strict settlement*: it was held  
 took an estate tail — a decision which was  
 and acted upon by Lord *Langdale*, M. R. (b)  
*ght v. Pullyn* (c), under a devise to A. for life,

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C. 1., 5 Scott, 223.  
*Douglas v. Con-*  
*man*, 59.

(c) 2 Ld. Raym, 1437.,  
 cited 1 Fearne, Cont. Rem.,  
 10th edit. 160.



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and, after his decease, to the heirs males of the body of the said *A.*, and his heirs, for ever, but, if *A.* shall die without such heir male, remainder over — *A.* was held to take an estate-tail. So, in *Coulson v. Coulson* (a), which was a devise to *C.* for life, remainder to *A.* and *B.*, and their heirs, to support contingent remainders, during the life of *C.*, remainder to the heirs of the body of *C.* lawfully begotten, upon a question whether *C.* took an estate-tail, or for life, a case was stated for the opinion of the judges of the King's Bench, who certified that an estate-tail in remainder vested in him. "Here," says Mr. *Fearne*, "it was the intent of the testator to give only an estate for life, if he meant any thing by the interposition of trustees to support contingent remainders; for, if he did not intend such an estate as might determine by forfeiture or otherwise in *C.*'s lifetime, there was no room for the estate to trustees during the life of *C.*; and, unless he meant that the heirs of *C.* should take by purchase, and not by descent, there were no contingent remainders to be supported." (b) So, in *Sayer v. Masterman* (c), the devise was in the following words: — "And, in case I die, not leaving issue born at the time of my death, or *in venter sa mere*, which shall afterwards be born alive, I do further give and devise, after the death of my said wife, to my brother *S. S.*, all those my several estates or farms at &c., during his natural life, with power of making any jointure or jointures upon any woman or women he shall marry, and, after his decease, to such child or children as shall lawfully be begotten by him, the males however to be preferred before the females, and they to succeed according to their births; and, in trust to preserve the contingent remainders from being barred during the life

(a) 2 *Str.* 1125.(b) 1 *Fearne*, 161.(c) *Ambler*, 344.



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Thus, in *Doe d. Candler v. Smith* (a), under a devise *A.* and the heirs of her body for ever, *as tenants in common*, and not as joint-tenants, and, in case *A.* die before twenty-one, or without leaving issue of her body, then to *B.* — it was held that *A.* took an estate-tail. So, in *Doe d. Cock v. Cooper* (b), a devise of a messuage and land to *R. C.* for the term only of his natural life, and, after his decease, to the issue of the said *R. C. as tenants in common*; but, in case the said *R. C.* shall die without leaving issue, then a devise of the same to *E. H.*, in fee, — was held to give *R. C.* an estate-tail, in order to effectuate the general intent. Again, in *Pierson v. Vickers* (c), under a devise of all freehold and copyhold estates whatsoever, situate at *B.*, with their appurtenances, to *A.* and the heirs of her body lawfully to be begotten, whether sons or daughters, as tenants in common, and, in default of such issue, then over, — it was held that *A.* took an estate-tail. All these cases were confirmed by *Jesson v. Wright*. (d) [*Tindal*, C. J. Regard being had to the contingencies that have happened, the first and last parts of the will exactly fit the case of the grandson *Samuel Llewelin*.] In the earlier part of the will, parties are named who are to take by descent, as well as others who are to take by purchase; why should the words in the devise in question “in manner aforesaid,” be referred to the latter, rather than to the former? Reading those words with reference to the whole will, they are just as consistent with the one construction as with the other. They may have been intended to have reference to elder sons taking before younger, or they may mean that the daughters should take undivided interests. There can be no cross-remainders with reference to estates for life. It is only by reason of the events that have happened, that there is

(a) 7 T. R. 531.

(b) 1 East, 229., 2 J. P. Smith, 160.

Smith, 163.

(c) 5 East, 548., 2 J. P.

Smith, 160.

(d) 2 Bligh, 1.



anything equivocal in this will. The burthen lies on the other side, to shew that the technical words are not to prevail.

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*Channell*, Serjt., in reply. It is not denied that the court may strike out words that are wholly repugnant and inconsistent with the general intention apparent from the whole will. The words "in manner aforesaid," in this devise, however, are not inconsistent with the general intention of the testator, but rather in furtherance of it. In the first place, he intended his son to take; that failing, his intention was that his grandson *Thomas Llewelin* should take; and, in default of the nomination to *Thomas Llewelin* taking effect, then that the four grandchildren *William, Samuel, Alice, and Hannah*, should take, for their lives, and the life of the survivor, as tenants in common. It is by no means clear that cross-remainders may not be implied in the case of life-estates. In *Jarman on Wills* (a), is this passage: "In a former work (b), the writer suggested the probability that the principles of construction upon which cross-remainders have been implied among devisees in tail, would be held to apply to estates for life; and, consequently, that, if a testator manifested an intention that property previously devised to several persons for life, as tenants in common, should not go over to the ulterior devisee until the decease of all the devisees for life, it would be concluded, by the same process of reasoning as had conducted to a similar conclusion in regard to devisees in tail, that the testator meant the surviving devisees or devisee for the time being, to take the shares of the deceased objects. Such a devise recently occurred, in the case of *Ashley v. Ashley* (c), where a testator devised real estate to the

(a) Vol. II. p. 478.

(b) 2 *Pow. Dev.*, by *Jarman*, 13, n.(c) 6 *Sim.* 358. And see *Pearce v. Edmeades*, 3 *Younge & Coll.* 246.



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use of his daughter *A.* for her life, and, after the termination of that estate, to the use of trustees to preserve, and, after her decease, to the use of all and every the child or children lawfully begotten and to be begotten on the body of *A.*, to take as tenants in common, and not as joint-tenants; *and, for want of such issue of A.*, then to the use of another daughter, and her children, in like manner. The master reported that the children of *A.* took life-estates only, without cross-remainders between them; but Sir *L. Shadwell*, V. C., expressed a strong opinion against the finding of the master. He observed that but one subject was given throughout; the expression ‘for want of such issue’ meant want of issue whenever that event might happen, either by there being no children originally, or by the children ceasing to exist. His honor accordingly declared that the children of *A.* took estates for life, as tenants in common, with cross-remainders between them for life.” In *Love v. Davies (a)*, where the testator devised to *B.* and his heirs lawfully to be begotten, “that is to say, to his first, second, third, and every other son and sons successively, lawfully to be begotten of the body of the said *B.*, and the heirs of the body of such first, second, &c.,” it was held that *B.* took but an estate for life; for, that the subsequent clause was explanatory of what “heirs” meant. Here, the whole will manifestly points to the benefit arising from survivorship.

*Cur. ad. val.*

COLTMAN, J. (*b*), delivered the judgment of the court.

The question in this case is, whether, in the event which have happened, *Samuel Morgan* took an estate in tail, or an estate for life only, under the will of *T.*

(*a*) 2 *Ld. Raym.* 1561.

(*b*) *Tindal*, C. J., was  
by reason of illness.



1 certain lands in the parishes of *Llanellin* *ver*, in the county of *Monmouth*: if he took for life only, the plaintiff, if in tail, the defendant to judgment.

— after devising the lands in question to the son *Samuel Morgan*, for life, with remainders in settlement to his issue, with remainder to the grandson, *Thomas Llewelin*, with remainder in settlement to his issue — devises as follows: —

in default of such issue, then to the use of my dear son *William Llewelin*, *Samuel Llewelin*, *Alice* and *Hannah Llewelin* (brothers and sisters of my grandson *Thomas Llewelin*), if they shall happen to be living at the time of his decease, for and during the term of their natural lives, and the life of the survivor of them, to take as tenants in common, and not as joint tenants; and, from and after their several deaths, and the decease of the survivor of them the said *William Llewelin*, *Samuel Llewelin*, *Alice Llewelin*, and *Hannah Llewelin*, to the use and behoof of the said *William* and every other the son and sons of the said *William*, and the bodies of my said grandchildren *William*, *Alice*, and *Hannah*, lawfully to be begotten, and successively and in remainder, one after another, as they and every of them shall be in priority and seniority of age, and of the several and sundry heirs of the body and bodies of all and every of the said *William* and sons lawfully issuing, the elder of such heirs to be preferred and to take before the younger of them, and the heirs of his body lawfully issuing, being preferred and to take before the younger of them, and the heirs of his and their body and bodies lawfully issuing, to take as tenants in common, and not as joint tenants; and, for want or in default of such issue, then to the use of all and every the daughter and daughters of the said *William*, and the bodies of my said grandchildren, *William*, *Alice*, and *Hannah*, lawfully to be begotten,

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and the heirs of the bodies of such daughters respectively lawfully issuing, the daughters of each of my said grandchildren, *William, Samuel, Alice, and Hannah*, more than one, to take as tenants in common, and as joint-tenants; and, in case of the death and failure of issue of any one or more of the said daughters of my said grandchildren, all and every the share and share of her or them so dying, when and so often as it shall so happen, shall go, remain, and enure to the survivor or survivors, and other and others of the said daughters and the heirs of the body and bodies of such surviving and other daughter and daughters respectively, such surviving daughters, if more than one, to take also in equal parts and shares as tenants in common, and not as joint-tenants; and, if all such daughters but one shall die without issue, or if there shall happen to be but one daughter of the body of my said grandchildren lawfully to be begotten, then to the use of such only surviving daughter and the heirs of her body lawfully issuing: and, in case either of my said grandchildren, *William, Samuel, Alice, and Hannah*, shall happen to die leaving no issue behind him, her, or them, then my will and meaning is, that all and singular the premises herein lastly devised shall go and remain to the survivor of them, and the heirs of his or her body lawfully to be begotten, in manner aforesaid; and, in failure of issue of either of their bodies, lawfully begotten, then I give, devise, and bequeath the same premises to the use of the children of my brothers, *Charles Morgan* and *James Morgan*, in manner following, that is to say, two third parts of the said premises unto the children of *Charles Morgan*, and one third part thereof to the children of *James Morgan*, and their lawful issue, their heirs and assigns for ever, share and share alike."

The devise to the four grandchildren and their issue consists of two clauses or parts; the first giving life-



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that contended for by the plaintiff, and is supported by the authority of decided cases. The clause was probably intended to supply a deficiency, or remove a doubt, arising on the first clause, as to the persons who should take, in the event of one or more of the grandchildren dying without leaving issue; and the words with which it commences — “my will and meaning is” — are properly introductory of an explanatory or supplemental clause. The words “in manner aforesaid” are necessarily connected, by grammatical construction with the words “shall go and remain,” and with the intermediate words “to the survivor, and the heirs of his or her body lawfully begotten as aforesaid.” The words “in manner aforesaid,” taken in this connexion, are an express reference to some manner of going and remaining before mentioned, by which an estate could go and remain to a grandchild and his or her heirs lawfully to be begotten; and there is no such manner of going and remaining in any preceding part of the will, except the first clause, which gives estates to the grandchildren for life, and to their sons and daughters in tail, which, though not, in words, a devise to the heirs of the bodies of the sons and daughters, is a devise which may not improperly be described as one to the heirs of the bodies of the sons and daughters, inasmuch as those who would take under it are the same persons, and would take in the same order of succession, and for the same extent of interest.

The defendant’s construction treats the words “in manner aforesaid” as something inoperative, and without any effect, in the meaning of the will, which, on this construction, is the same as if they were left out; whereas, the construction of the plaintiff gives them the appropriate effect of saving a long repetition of the detailed limitations to which they refer. “It is always desirable,” says Lord *Ellenborough*, in the case of *Me-*



*v. Meredith (a)*, in commenting on the words *as*  
*aid*, “if possible to give effect to all the words of  
and particularly where it enables the court to  
uniform and consistent sense to the whole will.”

also worthy of remark, that the words “lawfully  
en” are, in the first clause, applied to the sons  
ughters who take as purchasers, and not to their  
who are described as “heirs of their bodies law-  
suing,” or simply as “heirs of their bodies,”  
t the words “lawfully to be begotten.” And,  
hout the will, it will be found that the words  
illy to be begotten,” which occur a great many  
are applied to sons and daughters taking as pur-  
s, and not to heirs, with the exception of the  
in question, and the analogous clause in the de-  
the *Abergavenny* estate to *Alice* and *Hannah*, in  
as in that in question, the words “in manner  
id” are used to refer to a preceding clause similar  
first clause of the devise in question.

h respect to the intention of the testator, it is evi-  
at the construction which gives an estate-tail, is  
ant to the intention carefully expressed in the  
of the first clause, giving an estate-tail in the  
to an only daughter, which immediately precedes  
ond clause, and inconsistent with the general plan  
testator, as shewn by the devise to his son *Samuel*,  
o devises to *Thomas*, the devise to *William*, and  
o *Samuel*, the grandson; in all of which, the first  
has a life interest only.

re are several decided cases which support the  
uction which we have adopted, and none, that we  
are of, that are opposed to it. In *Lisle v. Gray (b)*,

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10 *East*, 510.2 *Lev.* 223., *Sir T.*114., *Sir T. Raym.* 278.315., *Pollexf.* 582., 2*Shower*, 7., 1 *Freem.* 462., 2*Atk.* 91., *Eq. Cases Abr.* 183.See also 1 *Peere Wms.* 90.; 7*M. & G.* 946.



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*A.* covenanted to stand seised to the use of *E.*, his son for life; and, after his decease, to the use of the first son of the body of *E.*, and the heirs male of the body of such first son; and, for default of such issue, to the use of the second son of the body of *E.*, and the heirs male of the body of such second son; and, for default of such issue, to the use of the third son of the body of *E.*, and the heirs male of the body of such third son; and, for default of such issue, to the use of the fourth son of the body of *E.*, and the heirs male of the body of such fourth son; and so, severally and respectively, to every one of the heirs male of the body of the said *E.*, and the heirs male of the bodies of such heirs male, according to their ages and seniorities: and it was held, by the King's Bench and Exchequer Chamber, that *E.* took an estate for life only, notwithstanding the express limitation to the heirs male of his body. In *Lowe v. Davies* (a), a devise was to *Benjamin Jevon* and his heirs lawfully to be begotten, that is to say, to his first, second, third, and every son and sons successively, lawfully to be begotten of the body of the said *Benjamin*, and the heirs of the body of such first, second, third, and every other son and sons successively, lawfully issuing: it was held, that *Benjamin* took an estate for life, and not in tail; and that the clauses which followed the limitation to the heirs of the body of *Benjamin*, were explanatory of what heirs of the body of *Benjamin* the devise meant. And in *Meredith v. Meredith* (b), the words "as aforesaid" were held "to draw down and incorporate" the words in a former clause. The two former of these cases were cited, and not denied, in the case of *Jesson v. Wright* (c): and they are examples (as we think the present case is,

(a) 2 Lord Raym. 1561.  
 And see *S. C.* somewhat differently reported, by the name of *Law v. Davis*, *Barnardis-*

*ton's Rep. in B. R.* 238., 8 *Vin. Abr.* 258.

(b) 10 *East*, 503.

(c) 2 *Bligh*, 1.



of the rule stated by Lord *Eldon* in that case (*a*), that the words heirs of the body “will yield to a clear particular intent that the estate should be only for life; and that may be from the effect of superadded words, or any expressions shewing the particular intent of the testator; but that must be clearly intelligible and unequivocal.”

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In the present case, the words “shall go and remain in manner aforesaid,” import a clear and distinct reference to the first clause of the devise, which draws it down, and incorporates it with the second: and the clauses so incorporated shew an intelligible and unequivocal particular intent, that a grandchild taking under the second clause shall, like those who take under the first, have an estate for life only.

For these reasons, we are of opinion that the judgment must be for the plaintiff.

Judgment for the plaintiff. (*b*)

(*a*) 2 *Bligh*, 53.

(*b*) And see *Bacon's Abridgm.*  
*tit. Legacies and Devises* (D);  
*Doe d. Gallini v. Gallini*, 5 *B.*  
& *Ad.* 621., 2 *N. & M.* 619.;

*Doe d. Linsey v. Edwards*, 5 *A.*  
& *E.* 95., 6 *N. & M.* 633.;  
*Hayes's Introduction to Con-*  
*veyancing*, 5th edit. Vol. I. p.  
542.



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## SMART and Another v. SANDARS and Others.

The mere relation of principal and factor confers, ordinarily, an authority to sell at such times and for such prices as the factor may, in the exercise of his discretion, think best for his employer : but, if he

**A**SSUMPSIT. The declaration stated that the defendants, before &c. were, and still are, corn-factors, and carried on, and continue to carry on, the trade and business of a corn-factor, at *Liverpool* ; that, on &c., in consideration that the plaintiffs, at the special instance and request of the defendants, had consigned and delivered to the defendants, to wit, as such factors as aforesaid, a cargo of wheat for and on account of the plaintiffs, to wit, for certain reasonable commission and reward to be paid by the plaintiffs to the defendants in that behalf, they the defendants undertook, and then faithfully pro-

receive the goods subject to any special instructions, he is bound to obey them.

The authority, whether general or special, is revocable.

*Quære*, whether the factor's authority to sell can be revoked after he has made advances upon the credit of the goods consigned to him, his authority then being coupled with an interest ?

In assumpsit, the declaration stated that the plaintiffs had consigned wheat to the defendants, who were corn factors, for sale on account of the plaintiffs ; that the defendants then promised the plaintiffs to obey and observe the lawful orders and directions of the plaintiffs to be given by them to the defendants in regard to the sale and disposal of the wheat, and that, although the plaintiffs ordered the defendants not to sell below a certain price, and although the same was a lawful order and direction in that behalf, yet the defendants, not regarding their promise, sold at a less price.

Plea, that, after the delivery of the wheat to the defendants, they became and were under advances to the plaintiffs in respect thereof ; that they gave the plaintiffs notice that they required to be repaid such advances, and that in default they should sell the wheat and repay themselves ; and that, although a reasonable time had elapsed, the plaintiffs did not repay them such advances ; whereupon the defendants, for the purpose of reimbursing themselves, sold the wheat for the best prices that could then be obtained for the same, &c. : —

Held, that the plea was bad in substance, there being nothing in the transaction disclosed upon the record, from which it could be inferred that it was part of the contract that at any time the wheat should be forfeited, or the defendant's authority to sell enlarged, so as to enable them to sell for repayment of advances, without reference to its being for the interest of the principals to sell at that particular time, and for that price. *Vide post*, p. 403. (c)



the plaintiffs to obey and observe the lawful  
and directions of the plaintiffs, to be given by  
the defendants, in regard to the sale and dis-  
the said wheat by the defendants for the plain-  
verment, that, although the defendants, as such  
then had and received the said cargo of wheat  
purpose, and upon the terms aforesaid; and,  
the defendants, afterwards, to wit, on &c., sold  
osed of a certain small quantity, to wit, twenty  
parcel of the said cargo of wheat; and, although  
ds, to wit, on &c., the defendants sold and dis-  
another quantity, to wit, six hundred bushels,  
ng other parcel of the said cargo of wheat, at  
a certain price, to wit, at the rate or price of  
for each and every of the said last-mentioned  
of wheat; and, although, afterwards, and after  
t-mentioned sale, and whilst the residue of the  
go of wheat remained in the hands of the de-  
as such factors unsold, to wit, on &c., the  
is ordered and directed the defendants, to wit,  
factors as aforesaid, not to sell any more of the  
go of wheat under 7s. per bushel, and then only  
xtent of a certain portion thereof, to wit, to the  
of 1600 to 2400 bushels,—and although the  
der and direction was then a lawful order and  
n in that behalf, and the defendants then, and  
fore any of the sales thereafter mentioned, had  
tice of such order and direction, and could and  
and ought to have obeyed and observed such  
nd direction,—yet the defendants, not regarding  
id promise and undertaking, but contriving and  
ng, &c., did not obey or observe the said order  
rection of the plaintiffs so given by them to the  
ants in respect of the said residue of the said  
of wheat as aforesaid, but then wholly neglected  
fused so to do, and wrongfully and injuriously

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sold and disposed of the whole of the said residue, the said cargo of wheat at and after the rate of ~~more~~ less than 7s. for each and every bushel thereof, that to say, &c. — [alleging a variety of sales] — and afterwards, to wit, on &c., the defendants wrongfully and injuriously sold and disposed of divers, to wit, 5376 bushels, being the remainder of such residue, at and after the rate of 6s. for each and every bushel thereof, contrary to the said order and direction of the plaintiffs so by them in that behalf given to the defendants as aforesaid, and contrary to the duty of the defendants as such factors as aforesaid in that behalf: Further, averment, that, although after the giving of the order and direction aforesaid, and after the violation thereof by the defendants, and whilst the remainder thereinbefore lastly specified of the said residue of the said cargo of wheat, to wit, the said quantity of 5375 bushels thereof, remained in the hands of the defendants, as such factors, unsold, to wit, on &c., the plaintiffs ordered and directed the defendants, to wit, as such factors as aforesaid, not to sell the said remainder of the said residue of the said cargo of wheat, or any part thereof, to wit, without further directions from the plaintiffs in that behalf; and that, although the last-mentioned order and direction was then a lawful order and direction in that behalf, and the defendants then, and long before the sale thereafter mentioned, had due notice of such last-mentioned order and direction, and could and might and ought to have obeyed and observed the same, yet the defendants, further disregarding their said promise, &c., wrongfully and injuriously sold and disposed of the said remainder of the said residue of the said cargo, without any further directions from the plaintiffs in that behalf, contrary to the last-mentioned order and direction of the plaintiffs, &c.: By reason of which said several premises the plaintiffs had sustained great loss, &c.



There was a second count in the same form, relating another cargo of wheat.

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Third plea — that, after the said cargo of wheat in the first count mentioned had been so consigned to the defendants as such factors, and before the alleged breaches of promise, to wit, on &c., the defendants, as such factors as aforesaid, became and were under advances to the plaintiffs in respect of the said consignment of the said cargo of wheat in the said first count mentioned, to a large amount, to wit, to the amount of £1000, and which said sum so advanced by the defendants, as such factors as aforesaid, to the plaintiffs, was due and payable by the plaintiffs to the defendants, and which said advances the defendants had come under the necessity of their having accepted divers bills of exchange for the plaintiffs, and at their request, against, and on the security of, the said cargo, before the giving of any of the said orders, to wit, on &c.; that thereupon, afterwards, and before the committing by the defendants of any of the said alleged breaches of promise, they, the defendants, gave notice to the plaintiffs that they, the defendants, required the said sum of money so advanced by the defendants, as such factors as aforesaid, in respect of the said consignment of the said cargo of wheat, to be repaid to them, the defendants, by the plaintiffs, and that, if the plaintiffs did not repay to them, the defendants, the said sum of money, they, the defendants, should sell the said whole of the residue of the said cargo of wheat, and out of the money to be produced at such sale, should repay themselves the said sum of money advanced by the defendants as in that plea aforesaid; that, although, after they, the defendants, had given to the plaintiffs the said notice in that plea mentioned, and, before the committing by the defendants of any of the said alleged breaches of promise, a reasonable time for the plaintiffs



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to have repaid to the defendants the said sum of money so advanced by the defendants as in this plea aforesaid had elapsed, yet the plaintiffs did not nor would repay to the defendants the said sum of money, or any part thereof, but wholly neglected and refused so to do, and the whole of such sum, at the time, &c., remained due and unpaid; and that, for the purpose of repaying to them, the defendants, the said sum of money, it was absolutely necessary for them, the defendants, to sell the whole of the residue of the said cargo of wheat in the said first count mentioned; wherefore the defendants, at the several times when &c. in the said first count mentioned, for the purpose of reimbursing and repaying to them, the defendants, the said sum of money so advanced by the defendants as in that plea aforesaid, sold the said residue of the said cargo of wheat at the said prices in the said first count mentioned, the same being the best prices which could then be obtained for the said residue of the said cargo of wheat, and with the moneys produced by the said last-mentioned sales, being a less amount than the amount of the said advances, did then repay and reimburse to them, the defendants, so much of the said sum so advanced by the defendants to the plaintiffs as aforesaid, as the said moneys so produced as aforesaid were sufficient to repay and reimburse, as they lawfully might, &c.

Fourth plea — that, before and at the time of the giving of the notice by the defendants to the plaintiffs, &c., the plaintiffs were indebted to the defendants in a large sum of money, to wit, the sum of 3000*l.*, for advances before then made by the defendants as such factors as aforesaid, to the plaintiffs, in respect of and against consignments of goods before then made by the plaintiffs to the defendants, as such factors as aforesaid, for the purpose of such goods being sold and disposed of by the defendants, as such factors as aforesaid, for the



plaintiffs, and, by reason of the plaintiffs being so indebted to the defendants as in that plea aforesaid, the defendants, as such factors as aforesaid, before and at the time &c., had a lien upon the said residue of the said cargo of wheat, in the first count mentioned, and upon the proceeds of the said residue of the said cargo of wheat, after the same was sold, for the said sum of money due and owing from the plaintiffs to the defendants as in that plea aforesaid; and had a right to have the said last-mentioned sum of money paid and satisfied to them, the defendants, out of the said proceeds of the said cargo of wheat in the said first count mentioned; but thereupon, they, defendants, after the plaintiffs had become, and whilst they were, so indebted to the defendants as in that plea aforesaid, and before the said alleged breaches, to wit, on &c., gave notice to the plaintiffs, &c.: concluding as in the third plea.

To these pleas,—as also to two others, viz. the eighth and ninth, which were similar pleas to the second count,—the plaintiffs demurred specially. The grounds of demurrer to the third and eighth pleas were—that it is not an inference of law that the defendants, under the circumstances in those pleas stated, were, as factors, entitled to sell the wheat in the first count mentioned, contrary to the orders and directions of their principals, the plaintiffs—that the defendants could only obtain the power so to sell, by reason of some *agreement* with the plaintiffs in that behalf; and that such agreement, if made subsequently to the promise in the first count mentioned, should have been expressly pleaded—that they were an argumentative traverse of the promise in the first count mentioned, and bad as amounting to the general issue—that they were uncertain, as leaving it doubtful whether the defendants meant to admit the promise in the first count mentioned, or to qualify and deny the same—that it was either no answer in law

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to the first count, or was, at most, an informal and ~~an~~ technical traverse of the allegation that the orders ~~and~~ directions in the first count mentioned, were ~~lawful~~ orders and directions — that it was double, in relying not only on the advances, but on an absolute necessity in fact for selling — that the facts creating such necessity should have been specially set forth — that the allegation of absolute necessity was uncertain, and too indefinite, and, if intended to be relied on as a material allegation, it should have been more explicit; and that, in its present indefinite form, the plaintiffs could not safely take issue on such allegation.

The grounds of demurrer to the fourth and ninth pleas were the same as the above, with this addition — that the defendants ought to have shewn with more particularity the right which they alleged they had to have their debt paid and satisfied out of the proceeds of the said wheat; and that the pleas were uncertain, in not shewing distinctly whether such right simply resulted from the defendants' general lien as factors, or whether such right was acquired otherwise.

*Channell*, Serjt. (with whom was *Taprell*), in support of the demurrers. The third plea sets up a right in the defendants to sell the wheat in question at lower prices than those at which they were directed by the plaintiffs to sell, by reason of the plaintiffs' omitting, in a reasonable time after notice to them, to repay the defendants the amount of advances made by them to the plaintiffs upon the security of the wheat; and it goes on to allege that it was absolutely necessary for the defendants to sell the whole residue of the wheat for that purpose, and that they sold it for the best price that could be obtained. The fourth plea sets up a lien on the wheat for advances, and justifies the sale for the purpose of repaying the defendants such advances, the



plaintiffs failing to repay them in a reasonable time after notice. These pleas are clearly bad in substance as well as in form. The declaration alleges a duty and a promise on the part of the defendants, as factors, to obey and observe the lawful orders and directions of the plaintiffs in regard to the sale and disposal of the wheat. The defendants, by their pleas, do not deny that they received the wheat on the terms which are stated in the declaration. If they rely on a right of sale, they rely on something that is substantially matter of contract. The plea, therefore, amounts to non assumpsit. [Maule, J. It is an argumentative denial that the order alleged in the declaration, was a lawful order in that behalf.] If the defendants had been under advances, and the plaintiffs had ordered them not to sell but at an extravagant price, that would not have been a lawful order. The third plea is also bad for uncertainty: it leaves it doubtful whether the defendants mean to admit the promise as pleaded, and deny the lawfulness of the order, or to deny the promise. Further, the plea is double, in relying not only upon the advances, but also upon the absolute necessity for selling — unless the necessity is qualified by the object, viz. the obtaining payment of the advances; and then the plea would be bad in substance. The defendants, as factors, clearly had a general lien on this wheat for their advances. A lien is, however, strictly speaking, matter of evidence only. It is a right to hold in pledge, but not to sell: *Dufresne v. Hutchinson* (a); *Raleigh v. Atkinson*. (b) In the last-mentioned case, the declaration, by assignees of bankrupts, stated, that the defendant was a commission agent at *Montreal*, and that the bankrupts, before their bankruptcy, delivered to him certain goods, which were not to be sold at less than invoice prices; that, at the

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(a) 3 Taunt. 117.

(b) 6 M. &amp; W. 670.



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time of the bankruptcy, a large quantity of these goods remained in the defendant's hands unsold; that the plaintiffs, being assignees of the bankrupts, directed the defendant not to sell the goods at less than invoice prices, until he had rendered to them an account of the goods, and the plaintiffs had been enabled to judge, as they had determined, and given the defendant notice, whether they would redeem the goods without sale or not, breach, that the defendant, after the bankruptcy, and after he had rendered an account of the goods, sold them at less than the invoice prices, although the defendant, after the rendering of the account, and before the sale, was required by the plaintiffs, and they gave him notice, *to send the goods to England*, and that they would redeem them without sale. The defendant pleaded, that, after the bankrupts had caused the goods to be delivered to him, and before and at and after the bankruptcy, and whilst the goods remained unsold in his hands, the defendant, for advances made before the bankruptcy, had a lien upon the goods; that the bankrupts, before their bankruptcy, and after the delivery of the goods, in consideration of the advances by the defendant, agreed with the defendant that he should sell the goods at the best market prices, and realise thereon against his said advances; that the defendant, relying upon the authority to him to sell and realise against his said advances, permitted his advances to remain unpaid for a long time, to wit, until and at and after the bankruptcy; that, after the bankruptcy, and after the defendant had rendered an account of the goods, and whilst they were unsold, the plaintiffs did not tender or offer to pay the defendant his advances or lien, or to redeem the goods before the defendant should part with them, and the said goods so remaining on hand were then deteriorating and depreciating in price, and the market getting worse; wherefore, he, the defendant, ex



exercising his best judgment for the estate of the bankrupts, and the plaintiffs as assignees, and to realise his advances, after he was required to send the goods to *London* to be redeemed, sold the said goods at the best market prices, according to the said authority of the bankrupts to him in that behalf, using his best judgment therein, as he lawfully might; and, after giving credit for the proceeds under such sale, there still remained due to the defendant a large sum of his said advances, and the estate of the bankrupts, and the plaintiffs, as assignees, were still indebted in a large amount on account of the advances. It was held, that the breach did not, by alleging that the plaintiffs gave the defendant notice *to send the goods to England*, render the declaration bad; and that the plea was bad, as it shewed no consideration for any agreement which deprived the bankrupts or the assignees of their right to revoke the authority to the defendant to sell. Here, the court is called upon, as a matter of law, to treat this as a justifiable sale, independently of contract. In *Story on Agency* (a), the law is thus laid down: "In respect to the rights conferred upon a party by a lien, it may be stated that they are generally of a very limited nature. As a lien is, ordinarily, nothing more than a right of retainer of the property, the party cannot sell or dispose of the property in order to satisfy his lien, unless, with the consent of the owner, either express, or implied from the nature and objects of the very transaction. Thus, for example, if goods are consigned to a factor for sale, and he makes advances upon them, he is, of course, invested with a right to sell them, and may, out of the proceeds, satisfy his lien, or use it by way of set-off. (b)

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(a) P. 330. s. 371.

(b) Citing 3 Chitt. on Com. and Manuf. 551.; Pothonier v. Dawson, Holt, N. P. C. 383.,

Zoit v. Millauden, 16 Martin, 471.; Montague on Lien, Pt. 1. ch. 3. pp. 23, 24.; 2 Liverm. on Agency, 103, 104.; 3 Kent,



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Nay, in certain cases, where he has made advance, it would seem to be clear that he may sell those advances, without the assent of the owner (*domino*), if the latter, after due notice of the intention to sell for the advances, does not repay him the amount. To this the learned author adds the following: "This point has been expressly decided in the court of *Massachusetts*, at the *March* term, 1846, in *Boston*, in the case of *Parker v. Brancher*. (a) *Thonier v. Dawson* (b), Lord Chief Justice Gibbs. "Undoubtedly, as a general proposition, a right of pledge gives no right to sell the goods. But, when goods are deposited by way of security, to indemnify against a loan of money, it is more than a pledge; the lender's rights are more extensive than such as are given under an ordinary lien in the way of trade. If goods were deposited to secure a loan. It may be inferred, therefore, that the contract was this: 'I (the borrower) repay the money, you must redeliver the goods; but, if I fail to repay it, you may use the goods as security I have left to repay yourself.' I think, that the defendant had a right to sell." *Story's* inference is not warranted by the authorities he cites. *Poth v. Dawson* was the case of a pledge. Referring to *and other cases* (c), Mr. *Smith*, in his *Leading Cases* says (d): "If the pawnor make default in paying at the stipulated time, the pawnee has a right to sell the pledge; and this he may do of his own accord, without any previous application to a court of equity."

*Byles*, Serjt. (with whom was *Crompton*), *contra* the pleas in question are good, as well in substance.

*Comm. Lect.* 41. p. 642. (3rd edit.)

(a) 2 *Law Reporter*, 46., for June, 1839. See also 3 *Chitt. on Com. and Manuf.* 551.

(b) *Holt*, N. P. C.

(c) *Tucker v. Wilson*, 261.; *Lockwood v. Wms.* 261.; 9 *Mod.* 278., 2 *Atk.* 31.

(d) Vol. I. p. 100.



rm. Goods having been consigned to a factor for  
 le, by whom money has been advanced upon them, it  
 not competent to the principal, after notice from the  
 ctor that he shall sell the goods unless the money ad-  
 anced by him is repaid, to recall the authority of the  
 utter to sell at the best market, — the authority being  
 ounded with an interest, and therefore irrevocable.  
 The doctrine laid down by Dr. Story, and for which he  
 cites *Parker v. Brancher*, has since been confirmed on  
 rit of error, by the supreme court of the United States,  
 in *Brown v. M'Gran (a)*, where the court, after stating  
 that the factor's right to sell may be controlled by  
 agreement, say: "On the other hand, where the con-  
 signment is made generally, without any specific orders  
 as to the time or mode of sale, and the factor makes  
 advances, or incurs liabilities, on the footing of such con-  
 signments, then the legal presumption is, that the factor  
 is intended to be clothed with the ordinary rights of  
 factors to sell, in the exercise of a sound discretion, at  
 such time and in such mode as the usage of trade and  
 his general duty require, and to reimburse himself for  
 his advances and liabilities out of the proceeds of the  
 sale; and the consignor has no right, by any subse-  
 quent orders given after advances have been made, or  
 liabilities incurred, by the factor, to suspend or control  
 his right of sale, except so far as respects the surplus  
 of the consignment, not necessary for the reimburse-  
 ment of such advances or liabilities." Thus, treating  
 the right of sale under such circumstances, as a right  
 implied by law, and not as a matter of contract, as is  
 intended for on the other side. The mere relation of  
 principal and factor clothes the latter with the right to  
 sell for the best price; and it is not competent to the  
 principal to revoke that authority where advances have

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(a) 14 *Peter's Rep.* 480.



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been made by the factor on the credit of the consignment. [*Cresswell*, J. All that *Story* says, is, that, where goods are consigned, the factor having a *general* discretion to sell, the principal cannot recall the authority without repaying the advances. Here, however, the declaration alleges the wheat to have been consigned to the defendants upon a promise by them to obey and observe the lawful orders and directions of the plaintiffs, to be given by them to the defendants in regard to the sale and disposal of the wheat by them. That is altogether a different contract.] A leading case upon this subject is *Gausson v. Morton* (a), where *A.*, being indebted to *B.*, in order to discharge the debt, executed to *B.* a power of attorney, authorising him to sell certain lands belonging to him, *A.*; and it was held that this, being an authority coupled with an interest, could not be revoked. So, in *Walsh v. Whitcomb* (b), Lord *Kenyon* says: "There is a difference in cases of powers of attorney: in general, they are revocable from their nature: but there are these exceptions—where a power of attorney is *part of a security* for money, there it is not revocable; where a power of attorney was made to levy a fine, as part of a security, it was held not to be revocable; the principle is applicable to every case where a power of attorney is necessary to effectuate any security; such is not revocable." The way in which the case of *Pothonier v. Dawson* is treated by *Story* and by *Smith*, is the true principle upon which that case proceeded, viz. that the power of sale is an incident implied by law. In *Story* on Bailments, it is laid down, in general terms, that a pledge implies a right of sale. The author says (c): "Another right resulting by the common law from the contract of pledge, is, the right to

(a) 10 *B. & C.* 731., 5 *M.*  
& *R.* 613.

(b) 2 *Esp. N. P. C.* 565.  
(c) 2nd edit. p. 206. s. 308.



ll the pledge, when there has been a default in the pledgor in complying with his engagement. Such a right does not divest the general property of the pawnor, it still leaves in him a right of redemption. But, if the pledge is not redeemed within the stipulated time, or a due performance of the contract for which it is a security, the pawnee has then a right to require a sale to be made thereof, in order to have his debt or indemnity. If there is no stipulated time for the payment of the debt, but the pledge is for an indefinite period, the pawnee has a right, upon request, to insist upon a prompt fulfilment of the engagement; and, if the pawnor neglects or refuses to comply, the pawnee may, upon demand, and notice to the pawnor, require the pawn to be sold." For these positions, the learned author refers to several American authorities. He then proceeds (a): "By the Roman law, a right of sale was given, to the same effect as in the common law. If a right to sell constituted a part of the contract, it was, of course, obligatory. If no such right was provided for in the contract, and a sale was not prohibited, it might be made; and, even if prohibited, the pledgee might, after regular notice and proceedings against the pledgor, have a right to sell, upon his default of payment. The sale might be by a judicial order of sale, or by the act of the party, after due notice to the owner; and, in either case, if the sale was *bonâ fide*, it passed the title completely to the purchaser. *Justinian*, however, directed, that, if any mode of selling was prescribed by the parties, that should be followed; and that, in the absence of any such stipulation, the pawnee might sell, after two years from the proper notice to the party, or upon a judicial sentence, and not before. The modern nations of continental *Europe*, and others using the

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(a) Ss. 309, 310.



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civil law, seem generally to have adopted the rule requiring a judicial sale. The code of *Louisiana* (a) has adopted the like course. The common law of *England*, existing in the time of *Glanville*, seems to have required a judicial process to justify the sale, or, at least, to destroy the right of redemption. But the law, as at present established, leaves an election to the pawnee. He may file a bill in equity against the pawnor for a foreclosure and sale; or he may proceed to sell *ex mero motu*, upon giving due notice of his intention to the pledgor. In the latter case, if the sale is *bond fide*, and reasonably made, it will be equally as obligatory as in the first case." The law is similarly laid down in *Kent's Commentaries* (b), a work of considerable authority. In *Ball's Principles of the Law of Scotland* (c), treating of pledge, it is said: "It gives no power to sell without the warrant of a judge; nor to make use of the subject; and the fruits, if reaped, go to the extinction of the debt. The right conferred is, merely to retain in security, and to resist all attempts by the owner, or those in his right, to recover the possession, till the debt be satisfied. But it is a real right completed by delivery and possession, which delivery can be given effectually only by one having the ownership or disposal. This, with continued possession of the thing impledged, are necessary to the creation and continuance of the real right in the pledge. A factor who has the goods of his principal in his hand, can effectually pledge them, or take advances on their consignment." The right of sale exists by the law of *France*. By the *Code de Commerce* (d), it is provided (e) that "a factor who makes advances on goods sent to him from another place for the purpose of being sold on account of a constituent, has the privilege of reimbursing

(a) Code of 1825, Art. 3182.

(b) 3rd edit. Vol. II. p. 642.

(c) 4th edit. 514. s. 1364.

(d) Tit. VI. s. 1.

(e) Art. 93.



of his advances, interest, and expenses, from the proceeds of the goods, when the goods are at his disposal in his warehouse, or in a public store, or where, they may have reached, he can prove by a bill of lading or by a letter of advice, that they have been sold. If (a) the goods have been sold and delivered on account of the constituent, the factor reimburses himself his advances, interest, and expenses, from the proceeds of the sale; and that in preference to the constituent's creditors." This question was mooted in *Smart v. M'Kay* (b), and Parke, B., intimated that the factor might sell to reimburse himself his advances. The result of the authorities seems to be, where there is a general consignment for sale, the factor, when advances are made, the law engrafts upon the contract a condition to the effect stated by Story. Where the contract is made subject to a condition, the plaintiff is bound to declare upon the contract, without noticing the condition: the defendant may plead it: *Smart v. Hyde*. (c)

J. You have not pleaded the condition here: the condition is implied in the declaration, the objection to the plea amounts to non assumpsit, is answered.] It is said that there is no traverse of the lawful contract; that, however, would be to traverse a mere legal conclusion. If the pleas are good in substance, they are good in point of form.

Wells, Serjt., in reply. The position contended for on the part of the defendants is not sustained by the authorities cited. The passage in Story on Bailments, § 308., is not in conformity with our law; or, if it must be understood as to pledges of a different character; for in § 311., he says: "The case of *Smart v. M'Kay* in this respect distinguishable from the or-

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dinary case of liens; for, a mere right of lien is not understood to carry with it any general right of sale to secure an indemnity. The foundation of the distinction rests in this, that the contract of pledge carries an implication that the security shall be made effectual to discharge the obligation; but, in the case of a lien, nothing is supposed to be given but a right of retention or detainer, unless under special circumstances." In *Clark v. Gilbert* (a), it was not contended that the defendant had a right to sell the pledge to repay himself. The right to sell cannot be treated as an inference of law. *Story*, in his *Law of Agency*, says (b): "From what has already been said, it is clear that all general liens have their origin in the positive or implied agreement of the parties. Some of them, however, have now, by the general usage of trade, become so fixed and invariable, that no proof whatsoever is required to establish their existence; but courts of justice take notice of them as a matter of course. (c) Others, again, are so variable and uncertain, or are so much affected by local usages, that, in all cases of controversy, they are required to be established by competent proof, before they are admitted. In practice, however, except for this purpose, the distinction between general liens by the usage of trade, and those arising from positive or special agreement, is little attended to." As to the question of condition; *Smart v. Hyde* stands on a particular footing, and does not warrant the deduction sought to be drawn from it. Here, the plea neither traverses, nor confesses and avoids, the promise declared on, and is clearly bad: *Whittaker v. Mason* (d); *Smith v. Dixon* (e); *Nash v. Breeze*. (g)

*Cur. adv. vult.*

(a) 2 N. C. 343., 2 Scott, 520.

(b) Page 333, s. 375.

(c) *Vide Brandão v. Barnett*, 6 M. & G. 670., n. (d).

(d) 2 N. C. 359., 2 Scott, 567.

(e) 7 Ad. & E. 1., 2 N & P. 1.

(g) 11 M. & W. 352.



COLTMAN, J. (in the absence of *Tindal*, C. J.), now delivered the judgment of the court.

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This was an action of assumpsit, in which the plaintiffs declared, — for that whereas the defendants were and are corn-factors at *Liverpool*, and heretofore, to wit, on the 23rd of *June*, 1842, in consideration that the plaintiffs, at the requests of the defendants, had consigned and delivered to them, as such factors, a cargo consisting of 8563 bushels of wheat, to be sold and disposed of by the defendants, as such factors, for and on account of the plaintiffs, for reasonable commission and reward to be paid by the plaintiffs to the defendants in that behalf, the defendants promised to obey and observe the lawful orders and directions of the plaintiffs, to be given by them to the defendants, in regard to the sale and disposal of the wheat; that the defendants afterwards sold and disposed of a small part of the wheat at 6s. 4d. per bushel, and that, although the plaintiffs ordered them not to sell any more for less than 7s. per bushel, yet the defendants sold for lower prices. There was a second count, in the same form, respecting another cargo of wheat.

The defendants pleaded, thirdly, to the first count, that, after the cargo of wheat therein mentioned, had been so consigned to the defendants, as such factors, and before the committing of the alleged breach of promise, to wit, on &c., the defendants, as such factors, became, and were under advances, to the plaintiffs in respect of the said consignment of the said cargo of wheat, to a large amount, to wit, to the amount of 3000*l.*, and which said sum so advanced to the plaintiffs was then due and payable by the plaintiffs to the defendants, and which advances the defendant had come under by reason of their having accepted divers bills of exchange for the plaintiffs, and at their request, against, and on the security of, the said cargo, before the giving of any of



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the orders in the said first count mentioned; that afterwards, and before the committing of the alleged breach of promise, the defendants gave notice to the plaintiffs that they required the said sum of money, advanced by them as such factors, to be repaid to them and that, if the plaintiffs did not repay them, they, the defendants, should sell the whole of the residue of the said wheat, and, out of the money produced by such sale, should repay themselves the money advanced; that a reasonable time for repayment elapsed, and that the plaintiffs did not repay the advances; and that, for the purpose of repaying to them, the defendants, the money so advanced, it was absolutely necessary for the defendants to sell the whole of the residue of the said wheat; wherefore, for the purpose of reimbursing and repaying to them the sums advanced, they sold the residue of the wheat, for the prices in the first count of the declaration mentioned, the same being the best prices which could be obtained for the same; and that the proceeds were not sufficient to repay to the defendants the whole of the money advanced by them.

The fourth plea stated that the plaintiffs were indebted to the defendants, as factors, for advances against other consignments, and that they had a lien upon the wheat in question for such advances, and a right to have them repaid out of the proceeds of the wheat: it then stated notice and non-payment, and the sale of the wheat, as before.

Similar pleas were pleaded to the second count.

To each of these pleas there was a demurrer. In that to the first of them, many special causes of demurrer were assigned: — that it was an argumentative traverse of the promise, and bad as amounting to the general issue; for, that, in answer to an averment in the declaration that the defendants promised to obey the lawful orders of the plaintiffs, the defendants by that



plea professed to shew that they only promised to obey such orders as should not be inconsistent with the right which they claimed, to sell, in order to repay advances; that it was uncertain whether they meant to admit or deny their promise, as in the first count mentioned; that, if they meant to insist that the advances gave them a subsequent authority to disobey the plaintiffs' orders, such authority should have been pleaded as the result of an express agreement, and should not have been left as a mere inference of law, &c.

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On the argument of this demurrer, several objections in point of form were urged against the plea; and also, that it was bad in substance, which, of course, was the most important question. In order to answer it, let us inquire what are the relative positions of principal and factor for sale. From the mere relation of principal and factor, the latter derives an authority to sell at such times and for such prices as he may, in the exercise of his discretion, think best for his employer; but, if he receives the goods, subject to any special instructions, he is bound to obey them; and the authority, whether general or special, is revocable. This was not denied, on behalf of the defendants: but it was contended, that, where a factor has advanced money on goods consigned to him for sale, the authority to sell is irrevocable, because coupled with an interest. That may be true; but it was incumbent on the defendants to maintain also, that, on the failure of the principal to repay such advances within a reasonable time after demand, the authority of the factor is enlarged, and that he has an absolute right to sell at any time for the best price that can be obtained, without regard to the interests of the principal, and without regard to the nature of the authority originally given. No case was cited in which this point appears to have been decided in an English court. In *Warner v. M'Kay*, it was incidentally men-



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tioned; and, as far as any opinion of the judges can be collected from the report, it would seem that *Parke*, I thought a factor might sell to pay advances, and that Lord *Abinger* was of a different opinion: and, certainly nothing which then passed, can be treated as an authority for our guidance in this case. But we were referred to a passage in *Story's Law of Agency*, in the chapter "On the Right of Lien of Agents," where it says: "In certain cases where he has made advances as factor, it would seem to be clear that he may sell to repay those advances, without the assent of the owner (*invito domino*), if the latter, after due notice of the intention to sell for advances, does not repay him the amount:" and for this he cites a decision in the supreme court of *Massachusetts*, and refers also to *Pothonier v Dawson*. The latter was not an instance of goods placed in the hands of a factor for sale, but of a party in whose hands goods were deposited to secure the repayment, at a time agreed upon, of money lent. In the case, *Gibbs*, C. J., says: "Undoubtedly, as a general proposition, a right of lien gives no right to sell the goods. But, when goods are deposited by way of security to indemnify a party against a loan of money it is *more than a pledge*. The lender's rights are more extensive than such as accrue under an ordinary lien in the way of trade." And he proceeds to say, that, from the nature of the transaction, it might be inferred that the contract was that the lender might sell, and repay himself, if the borrower failed to repay the money at the time agreed upon. We were also referred to *Story on Bailments*, chapter "On Pawns and Pledges (a)," where the rule of law is said to be, that, "if a pledge is not redeemed at the stipulated time, it may be sold by the pawnee, to repay himself." But the relation of

(a) Section 308.



principal and factor, where money has been advanced on goods consigned for sale, is not that of pawnor and pawnee. The goods are delivered for sale on account of, and for the benefit of, the principal, and not by way of security, to indemnify against a lien, although they operate as such security, the factor having a lien upon them, or upon their proceeds when sold, for the amount of his claim against the principal. The authority of the factor, whether general or special, may become irrevocable when advances have been made: but there is nothing in the transaction from which it can be inferred (to adopt the language of *Gibbs, C. J.*) that it was part of the contract, that, at any time, the goods should be forfeited, or the authority to sell enlarged, so as to enable the factor to sell at any time for repayment of advances, without reference to its being for the interest of the principal to sell at that time, and for that price. Nor can we find any principle in the law by which, independently of contract, such authority is given. On this ground, it appears to us that the third plea is bad, in substance; and it is unnecessary to consider whether this power claimed by the factor is to be considered as an enlargement of his original authority by some rule of law, as arising from some implied condition annexed to the original contract; in which case it would be very doubtful whether it ought not to be treated as a denial of the contract as laid in the declaration, and therefore bad as amounting to the general issue.

For the reasons above given, we think that the third plea is bad; and the other special pleas are open to the same objections. Our judgment must, therefore, be for the plaintiffs.

Judgment for the plaintiffs.

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*Crompton*, in the following *Michaelmas* term, on the part of the defendants, obtained a rule nisi for leave to

Leave granted  
to add pleas,



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alleging the  
sale to have  
been for the  
plaintiff's  
benefit.

amend the pleas as to which judgment had been pronounced on demurrer, and also those upon which issue was taken, for the purpose of shewing that the sale had been beneficial to the plaintiffs.

*Channell*, Serjt., and *Taprell*, shewed cause. Against the strong opinion intimated by this court, the plaintiff will only be driven to demur again, if the court allow the proposed amendment. Looking at the time that has elapsed since the former argument, it would be most unreasonable to grant such an indulgence to the defendants. In *Want v. Reece* (a), this court refused to allow an amendment after argument; and the court of Queen's Bench did the like in *Skuse v. Davies* (b). In *Bramah v. Roberts* (c), *Tindal*, C. J., says: "The law of *Westminster Hall*, I believe, ever since it stood in the place in which it now stands, has been, that, if a party thinks proper to rest his defence, or his case, upon a point of law raised upon the record, he must either stand or fall upon the point so raised." And in the recent case of *Jackson v. Galloway* (d), *Cresswell*, J., says: "I think it would be a most mischievous exercise of discretion to allow this amendment. Even upon the argument of a demurrer, it is contrary to our practice to allow parties to amend after judgment has been pronounced: it is a thing almost unheard of." [*Maule*, J. The amendment of pleas as to which issue is joined, is almost a matter of course.]

*Crompton*, in support of the rule. It is quite clear that the court has power to amend, if satisfied that the case is a fit one for the exercise of its discretion. The

(a) 7 *J. B. Moore*, 244.(d) *Ante*, Vol. I. p. 297.(b) 12 *A. & E.* 635.(c) 1 *N. C.* 481., 1 *Scott*, 364.



ment here proposed has become necessary in consequence of the judgment of this court being in conflict with American authorities upon which the defendants relied. [*Maule, J.*, referred to Lord *Campbell's* decision in *Brandão v. Barnett (a)*, in which the decision of the Exchequer Chamber, overturning that of this court, was reversed.] All that the defendants wish to say here, is, that the sale was not made improvidently.

[*Maule, J.* It certainly seems to me to be a wrong thing to amend the pleas demurred to, after they have been delivered on the demurrer. I think, however, that the defendants should have leave to add a plea.]

After some further discussion, the court gave leave to the defendants to add two pleas to each count, upon payment of costs.

Rule accordingly. (c)

*vide post,*

*M. & G.* 630., 8 *Scott*, 501.

The added pleas,—after payment of notice to the defendants, that the defendants should be repaid their advertisement,—contained an allegation, “at the time when the defendants gave the plaintiffs said notice in this plea, and from thence until and at the times when the defendants sold the said residue of cargo of wheat as in the first count mentioned, the defendants believed it to be, and was, for the benefit and use of the plaintiffs that the residue of the said cargo should be sold; and

the sales of the said residue of the said cargo of wheat in the said first count mentioned were beneficial advantageous sales for the plaintiffs, and were made by them the defendants in the exercise of a sound discretion, as such factors for sale as aforesaid, for the benefit of the plaintiffs, and at such times and for such prices as they the defendants, in the exercise of a sound discretion as such factors as aforesaid, thought it best for the plaintiffs that the said residue of the said cargo of wheat should be sold:” wherefore, &c.

To these added pleas the plaintiffs demurred specially; and the demurrers stand for argument in *M. T.* 1847.

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July 6.

## HAYWARD v. BENNETT.

To an action against a surety upon a bond given under the 1 & 2 Vict. c. 110. s. 8., the defendant pleaded, that, after the making of the bond, and before the commencement of the suit, the plaintiff brought an action against the principal in *B. R.*, and recovered

**D**EBT, upon a bond given by the defendant and others under the statute 1 & 2 Vict. c. 110. s. 8.

The declaration stated that the defendant, on the 5th of *February*, 1841, by his certain writing obligatory sealed with his seal, &c., acknowledged himself to be held and firmly bound to the plaintiff in the sum of 1363*l.* 10*s.* 3*d.* above demanded, to be paid to the plaintiff; yet the defendant, although often requested so to do, had not as yet paid the said sum of 1363*l.* 10*s.* 3*d.* above demanded, or any part thereof, to the plaintiff, &c.

The defendant cravedoyer of the bond and condition

By the bond it appeared that one *Henry Hales* was principal, and the defendant, *Thomas Harper Bennett* and one *Thomas Cope* sureties. The condition was a

judgment against him, and issued a *ca. sa.* thereon, under which the principal was taken; that the latter thereupon caused himself to be brought up by *habeas corpus* before a judge, "who then, and before any breach of the condition of the bond, and before the time for the principal rendering himself according to the practice of the said court, and the said condition had expired, and according to the practice of the said court, committed him into the custody of the marshal, in execution at the suit of the plaintiff upon the said judgment;" that the marshal received and kept him in execution as aforesaid, according to the practice of the said court, and after the return day of the *ca. sa.*, for a long space of time, to wit, hitherto and that, from the time of the recovery of the said judgment, until he was taken under the *ca. sa.*, the principal was always ready and willing to render himself according to the practice of the court and the said condition, and, whilst he remained in custody as aforesaid, was ready and willing to render himself, and would have rendered himself accordingly, *but that he was prevented by the plaintiff from so doing, in manner aforesaid: —*

Held, that, if the plea was to be regarded as a plea of *performance*, it was bad for not stating distinctly that the principal did render himself according to the practice of the court; and that, if it was to be considered as a plea in *excuse*, was equally bad, for not distinctly alleging that the act of the plaintiff in setting out the *ca. sa.* against the principal, made it impossible for him to render — court not taking judicial notice that the issuing of that writ was any impediment to a render.



follows: — “Whereas the said *James Hayward* hath by his affidavit sworn the 15th of *January* last, passed and filed in Her Majesty’s court of bankruptcy, deposed that *John Heffer* and the said *Henry Hales* are justly and truly indebted to him the said *James Hayward*, in the sum of 68 *l.* 15s. 1½*d.*, upon and by virtue of a promissory note bearing date the 8th of *January*, 1841, whereby the said *John Heffer* and *Henry Hales* promised, upon demand, to pay to Messrs. *Hammer & Son*, or to their order, 68 *l.* 15s. 1½*d.*, for value received; and which said promissory note had been indorsed by *Hammer & Son*, to the said *James Hayward*; and that payment of the said promissory note had been duly demanded of the said *John Heffer* and *Henry Hales*, but that the same was then due and wholly unpaid; and that the said *John Heffer* and *Henry Hales* were, at the time of the date and making of the said promissory note, and still were, traders within the meaning of the laws then in force concerning bankrupts, as the said *James Hayward* verily believed: and whereas the said *James Hayward* did, on the said 15th of *January* last, cause the said *Henry Hales* to be personally served with a copy of such affidavit, and with a notice in writing, requiring immediate payment of such alleged debt: and whereas the said *Henry Hales* hath requested the said *T. H. Bennett* and *T. Cope*, as sureties for him, to join him in the above-written bond, conditioned as hereinafter appearing; to which they have consented; and the said *Henry Hales* hath given notice thereof to the said *James Hayward*: Now, the condition of the above-written obligation is such, that, if the said *Henry Hales* do and shall pay unto the said *James Hayward*, his executors, administrators, and assigns, such sum or sums of money as shall be recovered against him the said *Henry Hales* and *John Heffer*, or against the said *Henry Hales*, in any action which hath been brought or shall hereafter be brought

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Held, that, if the plea was to be regarded as a plea of *performance*, it was bad, for not stating distinctly that the principal did render himself according to the practice of the court; and that, if it was to be considered as a plea in *excuse*, it was equally bad, for not distinctly alleging that the act of the plaintiff in suing out the *ca. sa.* against the principal, made it impossible for him to render — the court not taking judicial notice that the issuing of that writ was any impediment to a render.



plea professed to shew that they only promised to obey such orders as should not be inconsistent with the right which they claimed, to sell, in order to repay advances; that it was uncertain whether they meant to admit or deny their promise, as in the first count mentioned; that, if they meant to insist that the advances gave them a subsequent authority to disobey the plaintiffs' orders, such authority should have been pleaded as the result of an express agreement, and should not have been left as a mere inference of law, &c.

On the argument of this demurrer, several objections in point of form were urged against the plea; and also, that it was bad in substance, which, of course, was the most important question. In order to answer it, let us inquire what are the relative positions of principal and factor for sale. From the mere relation of principal and factor, the latter derives an authority to sell at such times and for such prices as he may, in the exercise of his discretion, think best for his employer; but, if he receives the goods, subject to any special instructions, he is bound to obey them; and the authority, whether general or special, is revocable. This was not denied, on behalf of the defendants: but it was contended, that, where a factor has advanced money on goods consigned to him for sale, the authority to sell is irrevocable, because coupled with an interest. That may be true; but it was incumbent on the defendants to maintain also, that, on the failure of the principal to repay such advances within a reasonable time after demand, the authority of the factor is enlarged, and that he has an absolute right to sell at any time for the best price that can be obtained, without regard to the interests of the principal, and without regard to the nature of the authority originally given. No case was cited in which this point appears to have been decided in an English court. In *Warner v. M'Kay*, it was incidentally men-

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for the recovery of the said alleged debt, together with such costs as shall be given in the same, or shall render himself to the custody of the gaoler of the court which such action shall have been brought, or may be brought, for the recovery of the said alleged debt according to the practice of such court, or within such time and in such manner as the said court, or any judge thereof, shall direct, after judgment shall have been recovered in such action; then the said obligation to be void, but otherwise the same to stand and remain in full force and effect."

Plea.

Action commenced in  
*B. R.*

Judgment obtained  
 therein.

*Ca. sa.*

Plea, that, after the making of the said writing obligatory and condition, and before the commencement of the suit, to wit, on the 5th of *February*, 1841, the plaintiff brought and commenced an action against *Heffer* and *Hales*, in the court of Queen's Bench, for the recovery of the said alleged debt in the condition mentioned, and the plaintiff afterwards, to wit, on the 30th of *June*, 1842, by the consideration and judgment of the said court, recovered in the said action, against *Heffer* and *Hales* 92*l.* 1*s.*, as well for and in respect of the said alleged debt in the said condition mentioned, as for his costs and charges by him about his suit in that behalf expended, — whereof the said *Heffer* and *Hales* were convicted: that afterwards, and before the commencement of this suit, and according to the practice of the said court, to wit, on the 29th of *October*, 1842, the plaintiff caused to be issued out of the court of Queen's Bench, upon the said judgment so recovered by him aforesaid, a certain writ of our said lady the Queen called a *ca. sa.*, against *Heffer* and *Hales*, &c., directed to the sheriffs of *London*; by which said writ our said lady the Queen commanded the said sheriffs, that they should take *Heffer* and *Hales*, &c., so that the said sheriffs might have their bodies before our said lady the Queen at *Westminster*, on the 15th of *November* then next



ensuing, to satisfy the plaintiff the said sum of 924*l.* 1*s.* so recovered as aforesaid, together with interest, &c.; and the said sheriffs were also commanded to have there then the said writ: that afterwards, and according to the practice of the said court, to wit, on the said 29th of *October*, 1842, the said writ was delivered by the plaintiff to the said sheriffs, to wit, &c. &c. then being such sheriffs as aforesaid: that afterwards, and whilst the said writ was in the hands of the sheriffs, and before the return thereof, and before the said 15th of *November* therein mentioned, and before any breach of the said condition of the said writing obligatory, and before the time for the said *Henry Hales* rendering himself according to the practice of the said court and the said condition, and within a reasonable time in that behalf before the commencement of this suit, to wit, on the 14th of *November*, 1842, the said *Henry Hales*, being within the bailiwick of the said sheriffs, was then, according to the practice of the said court, taken and arrested by the said sheriffs under the said writ, and then surrendered himself thereto, and was then kept and detained in execution in the custody of the said sheriffs under and by virtue of the said writ: that afterwards, and before any breach of the said condition of the said writing obligatory, and before the commencement of this suit, and whilst the said *Henry Hales* was and remained in the custody of the said sheriffs in execution under the said writ, and upon the said judgment so recovered as aforesaid, and within a reasonable time in that behalf, to wit, on the 14th of *November*, 1842, the said *Henry Hales* caused to be issued out of the said court of Queen's Bench, according to the practice of the said court, a certain other writ of our said lady the Queen, called a *habeas corpus cum causâ*, directed to the said sheriffs, whereby our said lady the Queen commanded the sheriffs to have the body of the said

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Arrest of  
principal.

*Habeas corpus*  
sued out.



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Committal of  
principal to  
custody of  
gaoler of the  
court.

*Henry Hales* before Lord *Denman*, C. J., at his chambers, in &c., immediately after the receipt of the said writ, to do and receive all and singular the things which the said chief justice should then and there consider of him in that behalf, and should also have there then the said last-mentioned writ: that the said last-mentioned writ was afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, according to the practice of the said court, delivered to the said sheriffs; that, under and by virtue of the said last-mentioned writ, the said sheriffs immediately, and within a reasonable time afterwards, to wit, on the day and year last aforesaid, according to the practice of the said court, brought the said *Henry Hales* before the Hon. Sir *J. Patteson*, one &c., who then, and according to the practice of the said court, received from the said sheriffs the body of the said *Henry Hales*, and then, and before any breach of the said condition of the said writing obligatory, and before the time for the said *Henry Hales* rendering himself according to the practice of the said court and the said condition, had expired, and before the commencement of this suit, to wit, on &c. last aforesaid, and according to the practice of the said court, committed the said *Henry Hales* into the custody of the marshal of the marshalsea of our lady the Queen before the Queen herself, to wit, of *T. C.*, as and then being such marshal, and as such marshal the gaoler of the said court of Queen's Bench, in which the said action was so brought, and judgment recovered as aforesaid, in execution at the suit of the plaintiff upon the said judgment for the said sum of money so recovered as aforesaid; and the said marshal then received and had and kept and detained the said *Henry Hales* under and by virtue of the said commitment, and in execution at the suit of the plaintiff upon the said judgment so recovered as aforesaid, and according to



the practice of the said court, until and after the return day of the said writ of *ca. sa.*, for a long space of time hereafter, to wit, hitherto, — of all which premises the plaintiff, afterwards and before the commencement of his suit, to wit, on &c. last aforesaid, had notice: that, after the commitment of the said *Henry Hales* as aforesaid, and before the commencement of this suit, to wit, on the 15th of *November*, 1842, the said sheriffs made their return to the said writ of *ca. sa.*, and thereby returned to the court of Queen's Bench, that, by virtue of the said writ of *ca. sa.*, they took the body of the said *Henry Hales*, whose body they safely kept until they received Her Majesty's writ of *habeas corpus cum causâ*, being the writ of *habeas corpus* before mentioned, directing the said sheriffs to have the body of the said *Henry Hales* before Lord *Denman*, C. J., and that, immediately after the receipt thereof, to wit, on the 16th of *November*, 6 *Vict.*, they had the body of the said *Henry Hales* before *Patteson*, J., who received from the said sheriffs the body of the said *Henry Hales*, and committed him into the custody of the marshal of the Marshalsea, there to remain until &c., and them, the said sheriffs, discharged from further custody of the said *Henry Hales* (*prout patet*): [and that, from the time of the recovery of the said judgment as aforesaid, until the said *Henry Hales* was so taken and arrested under the said writ of *ca. sa.* as aforesaid, the said *Henry Hales* was always ready and willing to render himself to the custody of the gaoler of the said court, according to the practice of the said court and the said condition of the said writing obligatory, and afterwards, and whilst he was and remained in custody as aforesaid, was ready and willing to render himself, and could have rendered himself accordingly, but that he was prevented by the plaintiff from so doing, in manner aforesaid]; and that the last-mentioned premises the

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Sheriffs' re-  
turn to *ca. sa.*

Principal  
always ready  
and willing to  
render, but  
prevented by  
plaintiff, &c.



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Special demurrer.

plaintiff, during the respective times last aforesaid, well knew — verification.

To this plea the plaintiff demurred specially, assigning for causes — that it confessed, but did not sufficiently avoid, the breach of the condition of the said writing obligatory in the declaration mentioned — that it admitted that the bond was forfeited, and did not shew any discharge or release of the action — that nothing was stated in the plea to shew that the condition of the bond was performed, or that it was not forfeited — that the defendant could not set up the matters stated in the plea, as an answer to the action on the record — that, if the matters stated in the plea amounted to a reasonable ground for relieving the defendant from his liability under the bond, the defendant should have availed himself of that circumstance by motion or application to the court, and not by way of plea — that the plea was double, in this, that it purported in one part to shew that the condition was performed by the render of *Hales*, and in another part, it set up matters by way of excuse for *Hales* not rendering according to the condition — that the plea was uncertain and argumentative, and no certain issue could be taken upon it — that, if the plea was to be taken as setting up an excuse for *Hales* not rendering himself according to the condition of the bond, then it was no answer to the action; and, if it was intended as shewing that *Hales* did render himself according to the condition, that the plea was bad for not distinctly stating a render, but leaving the same to be gathered by inference and implication, &c.

Joinder in demurrer.

*Byles*, Serjt., in support of the demurrer. The plea is clearly bad. It is double and doubtful. [*Maule*, J. Either it gives no answer, or it gives two answers.] The first question is, what is the proper course to be



taken by one who wishes to render in discharge of his bail. In *Archbold's Practice* (a), the rule is laid down that "Bail above may, as a matter of right (*ex debito justitiæ*), at any time pending the suit, or *before the return of the ca. sa.* against their principal, render him in their discharge, and may plead this render in any action against them." [Coltman, J. In the case of bail, the defendant is *in the custody* of his bail.] It is the duty of the bail to search for a *ca. sa.*, and to take the principal before the return day, and lodge him with the gaoler. The plaintiff is to be put to no expense. The plea here alleges a render, without saying, otherwise than argumentatively, that the render was before the return day of the *ca. sa.* It is doubtful whether this is a plea in excuse or in discharge. Assuming, however, that this is a sufficient allegation of a render before the return day, then the plea presents two answers to the action — that the principal *did* render himself pursuant to the condition of the bond — and that he was willing to render, but was by the act of the plaintiff prevented from doing so. And, the plea not relying upon mere matter of excuse, the plaintiff cannot reply *de injuriâ*. The defendant should have pleaded that *Hales* rendered himself according to the practice of the court. [Wilde, C. J. And might have given the special matter in evidence.] A general plea of performance would be good.

*Talfourd*, Serjt. (with whom was *Channell*, Serjt.), *contra*. The plea is good in substance and in form. Before the decision of this court in *Hinton v. Acraman* (b), great doubt existed as to the course of proceeding in relation to these bonds. The condition of the bond being that the principal should pay such sum or sums as should be recovered against him in

(a) 7th edit. by *Chitty*, vol. I. p. 622.; citing *Simmons v. Middleton*, 8 *Mod.* 341., 1 *Ld. Rayn.* 156., 1 *Wils.* 270., *Mannin v. Armitage*, 14 *East*, 599., and *Armitage v. Rigbye*, 5 *A. & E.* 81.  
(b) *Ante*, Vol. II. p. 367.

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any action brought or to be brought for the recovery of the alleged debt, together with costs, or should render himself to the custody of the gaoler of the court in which such action should be brought, according to the practice of such court, or within such time and in such manner as the said court, or any judge thereof, should direct, after judgment should have been recovered in such action, — it was contended that there were only two alternatives, payment or render: but the court held that a plea alleging that no *ca. sa.* had been sued out against the principal, was good; and that, although no such terms were to be found in the condition, it must be read as if it had made the issuing of a *ca. sa.* a condition precedent; and also that a plea that the principal was rendered before the expiration of the time for rendering, enlarged by judge's order or rule of court. The plea in the present case is, in substance, a plea, not of performance, but in excuse, — shewing that the plaintiff has, by his own act, prevented the defendant from performing the condition. The court will not take notice of the purpose for which the *ca. sa.* was issued. The natural and legal consequences followed its issuing, viz., that the principal was arrested under it. Having his debtor in execution, how can the plaintiff have a collateral remedy against a surety? The court can know nothing judicially of the practice in the sheriffs' office. [*Tindal*, C. J. Should not the plea have distinctly admitted a breach of the condition of the bond?] The plea is in excuse of the non-performance. The defendant does not admit a breach. [*Tindal*, C. J. If there has been no breach, what do you want with an excuse?] The plea confesses that the principal was not rendered. It alleges that a render became, by the plaintiff's act, impossible: that would probably have been sufficient. [*Maule*, J. To state that a render became impossible, is only an argumentative way of saying that no render was in fact made.] In *Hinton v. Acraman*.



this sort of plea was treated as a plea in excuse. [Maule, J. We held, in that case, that the plaintiff was to have an opportunity to lodge a *ca. sa.* for the purpose of fixing the bail; not that he was bound to do so. I doubt whether it would not have been a sufficient defence, to have stated that the plaintiff took the principal under a *ca. sa.*] The plea is not necessarily bad because it contains the further statement that the principal removed himself by *habeas corpus* into the custody of the gaoler of the court in which the action was brought and the judgment obtained.

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*Byles*, Serjt., in reply. The practice of the sheriffs' office is recognized by a rule of court (a), which provides, that, "in actions commenced by bill, a *ca. sa.* to fix bail shall have eight days between the teste and return; and, in actions commenced by original, fifteen; and must, in *London* and *Middlesex*, be entered four days in the public book at the sheriffs' office." (b) The circumstance of the principal having been arrested under the *ca. sa.*, was no mistake of the plaintiff's: the warrant is not shewn to have issued at his instance. [Maule, J. No mistake is suggested: the defendant merely alleges that you did what you had a right to do—that you issued a *ca. sa.*, and took the party under it.] The plea imposed great difficulty upon the plaintiff in replying. He could not have safely left unanswered the allegation that the principal rendered himself. That might have been a good render. [Maule, J. Not after the return day of the *ca. sa.*]

*Cur. adv. vult.*

COLTMAN, J., now delivered the judgment of the court.

(a) *H. T.*, 2 *W. 4.* r. 77.      1 *M. & W.* 58., 4 *Dowl. P. C.*  
 (b) See *Kemp v. Hyslop*, 687.



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This was an action of debt, on a bond entered into pursuant to the statute 1 & 2 *Vict. c.* 110. s. 8.

The defendant craved oyer of the bond and of the condition, which,—after reciting that *James Hayward* (the plaintiff in this action) had made affidavit that *John Heffer* and *Henry Hales* were indebted to him in the sum of 68*l.* 15*s.* 1½*d.*,—was, that, if *Hales* did and should pay to *Hayward* such sum or sums of money as should be recovered against *Hales* and *Heffer*, or against *Hales*, in any action which had been brought, or should thereafter be brought, for the recovery of the said alleged debt, together with such costs as should be given in the same, or should render himself to the custody of the gaoler of the court in which such action should have been, or might be, brought for recovery of the said alleged debt, according to the practice of such court, or within such time, and in such manner, as the said court, or any judge thereof, should direct, after judgment should have been recovered in such action;—then the said obligation should be void, but otherwise the same should stand and remain in full force and effect.

The defendant thereupon pleaded, in substance, that, after the making of the said writing obligatory, and before the commencement of this suit, to wit, on &c., the plaintiff brought and commenced an action in the Queen's Bench against *Heffer* and *Hales*, for the recovery of the said alleged debt in the condition mentioned, and that the plaintiff afterwards recovered against *Heffer* and *Hales* 92*l.* 1*s.*, as well in respect of the said debt, as for his costs and charges; and that, afterwards, and before the commencement of this suit, and according to the practice of the said court, to wit, on the 29th of *October*, 1842, the plaintiff caused to be issued out of the court of Queen's Bench, upon the said judgment so recovered by him as aforesaid, a writ of *capias ad satisfaciendum* against *Heffer* and *Hales*, directed to the sheriffs of *London*; whereby the Queen commanded



the said sheriffs, that they should take *Heffer* and *Hales*, and them safely keep, so that the said sheriffs might have the bodies of *Heffer* and *Hales* before our said lady the Queen, at *Westminster*, on *Tuesday*, the 15th day of *November* then next ensuing, to satisfy the plaintiff the said sum of 924*l.* 1*s.*, together with interest, at the rate of 4 per cent., from the 30th of *June*, 1842; and the sheriffs were also commanded to have there then that writ: that afterwards, and according to the practice of the court, the said writ was delivered by the plaintiff to the sheriffs, and that, afterwards, and before the return thereof, and before the 15th of *November* therein mentioned, and before any breach of the said condition, and before the time for *Hales* rendering himself, according to the practice of the said court and the said condition, and within a reasonable time in that behalf before the commencement of this suit, to wit, on the 14th of *November*, 1842, *Hales*, being within the bailiwick of the said sheriffs, was then, according to the practice of the said court, taken and arrested by the said sheriffs, under the said writ, and then surrendered himself thereto, and was then kept and detained in execution in the custody of the said sheriffs by virtue of the said writ: and that, afterwards, and before any breach of the said condition, and before the commencement of this suit, and whilst *Hales* remained in the custody of the said sheriffs in execution under the said writ, and upon the said judgment, and within a reasonable time in this behalf, to wit, on the 14th of *February*, 1842, *Hales* caused to be issued out of the said court of Queen's Bench, according to the practice of the said court, a writ of *habeas corpus cum causa*, directed to the said sheriffs, whereby the Queen commanded the said sheriffs to have the body of *Hales* before the lord chief justice, to do and receive, &c.: that the last-mentioned writ was afterwards, and before the commencement of this suit, to wit, on &c., according to the practice of the said court, delivered to the said

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sheriffs, and, under and by virtue of the said writ, the said sheriffs immediately, and within a reasonable time afterwards, to wit, on &c., and according to the practice of the said court, brought *Hales* before the Hon. Sir *J. Patteson*, one of Her Majesty's justices, &c., who then, and according to the practice of the said court, received from the said sheriffs the body of *Hales*, and then, and before any breach of the said condition, and before the time for *Hales* rendering himself according to the practice of the said court and the said condition, had expired, and before the commencement of this suit, to wit, on the day and year last aforesaid, and according to the practice of the said court, committed *Hales* into the custody of the marshal of the marshalsea, &c., to wit, &c., as and then being such marshal, and, as such marshal, the gaoler of the said court of our said lady the Queen before the Queen herself, in execution at the suit of the plaintiff upon the said judgment; and the said marshal then received, had, kept, and detained *Hales*, under and by virtue of the said commitment, in execution at the suit of the plaintiff, upon the said judgment, and according to the practice of the said court, until and after the return day of the said writ of *capias ad satisfaciendum*, to wit, hitherto; of all which premises the plaintiff had notice: that, after the commitment of *Hales* as aforesaid, and before the commencement of this suit, to wit, on the 15th of *November*, 1842, the said sheriffs made their return to the said writ of *capias ad satisfaciendum*, and thereby returned that they had taken *Hales*, and safely kept him until they received the writ of *habeas corpus*, — and so returned the committal of *Hales* by *Patteson*, J.: that, from the time of the recovery of the said judgment, until *Hales* was taken and arrested under the said writ of *capias ad satisfaciendum*, he, *Hales*, was always ready and willing to render himself to the custody of the gaoler of the said court, according to the practice of the said court and



t-mentioned premises the plaintiff, during the  
e times last aforesaid, well knew.

is plea the plaintiff demurred specially, on the  
that it purports in one part to shew that the  
1 of the writing obligatory was performed by  
ler of *Hales*, and, in another part, sets up  
in excuse for *Hales's* not rendering according to  
ition; that, if the plea was to be taken as shew-  
*Hales* rendered himself according to the con-  
; was bad for not stating, distinctly, that he did  
himself according to the practice of the court,  
thead thereof, leaving it to be collected by in-  
only; and that, if it was to be taken as setting  
er of excuse for not rendering according to the  
n, it did not shew any sufficient excuse, or any  
to the action.

hink it clear, that, if the plea is to be looked at  
a of performance, it is defective, on the ground  
out in the demurrer; for, we cannot, in this  
like notice of the practice of the court of Queen's  
and, if the matters pleaded, do constitute a  
according to the practice of that court, that  
ave been made matter of substantive averment.  
ie part of the defendant, indeed, it was not con-  
that the plea could be considered as setting up  
re had been a render of *Hales*, according to the  
of the court: but it was contended that the



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impossible, by the act of the obligee, the obligor shall be excused from the performance of it. *Co. Litt.* 206. a. But it does not appear to us that the defendant in this case has shewn the existence of any such impossibility. The act relied upon for that purpose, is, the suing out of a *capias ad satisfaciendum*, and delivering it to the sheriffs; from which it is intended that the court should infer that it was thereby become impossible for *Hales* to render himself to the custody of the marshal, according to the practice of the court of Queen's Bench. If any such impossibility did, in fact, exist, it should have been averred distinctly, so that a certain and definite issue might be taken upon it. Instead of making such an allegation, all that the defendant says, is, that *Hales* would have rendered himself, but that he was prevented by the plaintiff, in manner aforesaid; in other words, that he was prevented by the plaintiff's suing out the *capias ad satisfaciendum*, which the court cannot judicially know to be any impediment whatever to the render.

We think, therefore, that the plea is bad, and that there must be judgment for the plaintiff thereupon.

Judgment for the plaintiff.

Additional  
 plea allowed  
 to be pleaded,  
 after judgment  
 for plaintiff on  
 demurrer, and  
 without affidavit  
 of  
 merita.

*Talfourd*, Serjt., on behalf of the defendant, on the 4th of *November* following, moved for a rule nisi to amend the second plea, by stating in a more formal manner the same defence which the court held to be therein formally alleged — substituting for the words within brackets, *antè*, p. 409, the following, “by means whereof, he the defendant was exonerated and discharged from rendering the said *Henry Hales* ;” or to add two pleas. The affidavit upon which the motion was founded, stated, that, the defendant's counsel not being present at the time the judgment was delivered (of which no notice had been given), his attorney, on the same day (*July* 6), took out a summons calling upon the plaintiff to shew



case why the defendant should not be at liberty to amend the second plea, on payment of costs, or why the rule for judgment on the demurrer should not be stayed until the fifth day of the following term; that, on the hearing of the summons, *Pollock*, C. B., on the 3th of *July*, made an order staying the proceedings until the fifth day of *Michaelmas* term: and the deponent (the defendant's attorney) further said, "that was necessary, in the judgment and opinion of counsel consulted by him, as also of him, the deponent, that the said second plea so pleaded by the defendant should be amended, or that the defendant should be at liberty to add two other special pleas, which he, the deponent, considered requisite and necessary for the defendant, in support of his defence to the action."

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WILDE, C. J. You may have a rule in the alternative; but take care not to infringe the rule against pleading two pleas to the same matter of defence.

*Butt*, and *Byles*, Serjt., now shewed cause. The point sought to be raised by the proposed amendment, is the same as that already raised by two of the pleas upon this record. In *Munnings v. Lennor* (a), in an action of covenant on a charter-party, the defendant pleaded several special pleas, to some of which the plaintiff demurred, and upon which, after argument, he obtained judgment: and this court refused to permit him afterwards to file additional pleas, although it was sworn that facts material to his defence had come to his knowledge since the argument of the demurrer. In the present case, the defendant does not even shew that any facts have come to his knowledge for the first time since the former pleas were pleaded: nor is there any affidavit that the proposed amendment is material to the merits of the

(a) 12 *J. B. Moore*, 133.



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cause; amendments are never allowed after judgment on demurrer, without an affidavit of merits: *Bramall v. Roberts* (a); *Farebrother v. Worsley* (b); *Skuse v. Davis*. (c) Cresswell, J., says, in *Jackson v. Galloway* (d): "It is contrary to our practice to allow parties to amend after judgment has been pronounced it is a thing almost unheard of." If that which is here stated, amounts to a render according to the practice of the court, and the condition of the bond, it is already upon the record (e); and, therefore, the court cannot, consistently with the new rules, allow the proposed amendment. [Maule, J. The substance of the plea, as proposed, is, that, if that which was done does not amount to a render, the failure to render resulted from the plaintiff's conduct, which made a render impossible.] They wish to shew that a *ca. sa.* was lodged, and no return of *non est inventus* made. The courts have repeatedly recognized the practice of the sheriff's office. In *Magnay v. Monger* (g), it was held, that, where a *ca. sa.* is indorsed with a direction "to be returned *non est inventus*," the meaning is, that the sheriff is not to search for the debtor; but, if the debtor surrenders himself, the sheriff must detain him, and he is then entitled to his poundage under the stat. 29 *Eliz. c. 4.* (h). The surrender of himself to the sheriffs by *Hales*, took place on the 14th of *November*, 1842; Mr. Justice Coleridge's order for the render was made on the 11th of *February*, 1843. [Maule, J. According to *Hinton v. Acraman*, the meaning of issuing a *ca. sa.* indorsed to return *non est inventus*, is, to tell the sheriff, that, although he is

(a) 1 *N. C.* 481., 1 *Scott*, 364.

(b) 1 *C. & J.* 549., 1 *Tyrwh.* 437., 1 *Price*, *P. C.* 64.

(c) 10 *Ad. & E.* 640., 2 *P. & D.* 550., 7 *Dowl. P. C.* 774.

(d) *Ante*, Vol. I. p. 297.

(e) By the first and third pleas, upon which issue had been taken.

(g) 4 *Q. B.* 817.

(h) Or to his fees, since the 1st of *March*, 1843, by stat. 5 & 6 *Vict. c. 98.*



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directed to take the defendant, the plaintiff will not complain if the sheriff is not diligent in looking for him.

*Wilde, C. J.* It operates as notice to the defendant to come in and save his bail. The situation of the parties is the same as if the defendant came to the sheriff, and the sheriff took him, as he would be bound to do notwithstanding the indorsement.] The question is, whether the condition was broken. [*Coltman, J.* You say that the defendant has not complied with the condition. They wish to raise the point, whether suing out a *ca. sa.* did not dispense with the performance of the condition.

*Wilde, C. J.* Recognisance of bail is satisfied by a taking by the sheriff under a *ca. sa.*] The practice is to remove the defendant by a judge's order. [*Wilde, C. J.* The defendant is never taken to a judge's chambers, except for the purpose of charging him in execution. There was no mode of rendering *according to the practice of the court*, if no *ca. sa.* were issued. There being no practice with reference to these bonds, the court was obliged to invent a practice.] The plea demurred to ought never to have been pleaded, being in violation of the new rules. The statute and the condition are express, that the debtor shall be rendered into the custody of the gaoler of the court in which the action is brought. While in custody of the sheriff, he is not in custody of the gaoler of the court. [*Wilde, C. J.* In the case of bail, the courts never require useless circuitry. *Maule, J.* The word render, taken in a popular sense, means that the party shall get into the custody of the court. *Wilde, C. J.* The object of this act was to give the plaintiff all the security he had before in the shape of bail.]

*Talfourd, Serjt., and Ogle*, in support of the rule. The present pleas allege a render: they do not shew an excuse for *not* rendering. [*Wilde, C. J.* Swearing to



if error had been brought, an amendment would have been allowed, notwithstanding the judgment which had been carried in. In *Mellish v. Richardson* (a), this error was assigned and argued in the court of King's Bench, amended the *postea*, and afterwards amended the judgment roll in this court by the amended judgment, although judgment of reversal had been pronounced in the King's Bench. It is said that there were no other pleas of performance on the record. The plea which demurred was not intended as a plea of performance, nor was it so argued. The judgment proceeded on the ground of duplicity. [Maule, J. The ground upon which the judgment proceeded, was, that the plea stating a render under Mr. J. Coleridge's order was a plea which went on to state facts which either rendered the plea double or even impertinent. The court did not mean to state that the parties considered it as a plea of performance. Wilde, C. J. Those who say that it was not a render, will have great difficulty in stating what the defendant could have done.] By the act of the plaintiff in issuing the *ca. sa.*, and the consequences resulting from that act, the surety was discharged. It was not possible for the defendant to perform his obligation in any other way than that stated here. [Wilde, C. J. Suppose Hales had been in the sheriffs' custody at the suit of a third party; in that case he could only have been rendered in the next



erence can it make, that he was in the sheriffs' custody by the act of the plaintiff himself? The order of *Coleridge, J.*, was immaterial, but I think the commitment by *Patteson, J.*, was a strict technical performance of the condition of the bond.] It was the only course the plaintiff had left open.

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**WILDE, C. J.** It is extremely important, in cases of this sort, that the court should not, with the view of avoiding from a difficulty in a particular case, depart from the general rules which they have laid down for the guidance of their discretion. One question here is, whether the proposed plea can be allowed consistently with the new rules,—whether it raises the same defence as other pleas already on the record. The new rules have been framed with great care; but, like all human provisions, they cannot meet every case to which the complicated and multitudinous affairs of this kind give rise; and therefore the courts have, on various occasions, been called upon to explain, and sometimes to relax them. It is true that the plea sought to be pleaded contains the same facts as appear upon one of those already on the record. But it does not appear to me that they are intended to set up the same defence. The court may be of opinion that the new plea alleges sufficient excuse for the non-performance by the defendant of the condition of the bond; or they may think it equivalent to a performance. If an obligee prevents the performance of the condition of the bond, it is, as against the obligor, equivalent to performance. Within that rule, the defendant may, perhaps, shew that the plaintiff, by the course he has pursued, has dispensed with the full performance of the condition of the bond. I am of opinion that that does amount to a distinct defence, and that in allowing it we shall not violate



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the new rules. It would be irregular now to speculate upon the effect of the plea: it is enough to say that I think the defendant ought to be permitted to offer the proposed defence. It is said that it is not consistent with the practice of the court to allow amendments in the pleadings after a judgment on demurrer. Each case, however, must very much depend upon its own peculiar circumstances. Here, the judgment appears to have been pronounced at a time when the defendant's counsel were absent; and, consequently, he had no opportunity of asking for this indulgence at that period. Taking that into consideration, and considering also that the statute, under which the question arises, was prepared by persons not very conversant with the practice of courts of law, and the peculiar nature of the action, I think we shall be justified in treating it as a case excepted from the general rule, and that justice requires that the defendant should have the relief he seeks, on payment of costs within a week after taxation.

The rest of the court concurring,

Rule absolute accordingly.



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## GAMBLE v. KURTZ.

July 6.

CASE, for an alleged infringement by the defendant of a patent, granted to the plaintiff on the 11th of March, 1839, for "Improvements in apparatus for the manufacture of sulphate of soda, muriatic acid, chlorine, and chlorides."

Pleas — first, not guilty — secondly, that the plaintiff was not the true and first inventor — thirdly, that the alleged invention was not new — fourthly, that the alleged invention was not properly described in the specification — fifthly, that the manufacture was not the subject of a patent — sixthly, that a material part of the alleged invention was not an improvement.

The cause was tried before *Coltman, J.*, at the sittings at *Westminster*, after last *Hilary* term.

It appeared that the apparatus formerly in common use for the making of sulphate of soda, was, a brick reverberatory furnace, consisting of but one chamber, with a fire at one end, which, striking against the roof of the chamber, was reflected down to the floor; the gas and smoke passing out at the other end. There being two different stages in the manufacture of the article — the decomposing of the raw material, salt, and the roasting or finishing — each requiring a different degree of temperature, inconvenience and delay resulted from the whole process being carried on in the same place.

Prior to the date of the plaintiff's patent, viz. on the 3th of *October*, 1836, one *Lutwyche* obtained a patent for "Improvements in the construction of apparatus used in the decomposition of common salt, and in the mode or method of working or using the same." By

Where letters-patent were granted for improvements in apparatus for the manufacture of certain chemical substances, and the jury found that the apparatus was not new, but that the patentee's mode of connecting the parts of that apparatus was new, the court directed the verdict to be entered for the defendant upon an issue taken upon the novelty of the invention.



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his specification, *Lutwyche* stated, amongst other things as follows: — “ These improvements are designed to prevent the muriatic acid gas from escaping into the atmosphere during the decomposition of the salt; which is effected by condensing such gas in suitable apparatus. It is also intended to carry on the process or manufacture in a more advantageous manner than it can be done by the apparatus now in common use, at the same time saving a large portion of the gas so condensed, in the form of muriatic acid. The apparatus usually employed for the decomposition of common salt with sulphuric acid, consists either of iron cylindrical retorts, or of open furnaces composed of *brickwork*. When the former is used, the heat is applied externally by a fire under the bottom of the iron retort; and the object to be gained in this mode, beyond the making of the sulphate of soda, is, to collect the muriatic acid, which is effected by receiving the gas evolved during the operation into double-necked jars or carboys, connected together at their upper parts, and to the retort, by earthenware pipes, with proper luted joints. But, where the latter mode is used, the principal object is, to obtain the salt cake or sulphate of soda of a better quality, and in a more perfect state, than when made in close iron vessels; by which process the fire and flame are allowed to play directly upon the materials under operation, and the gas is allowed to escape up the chimney into the atmosphere. Imperfect decomposition of the salt, impurity of the acid, and difficulty of condensation, attend the first of these methods: and, by the second process of operation, viz. decomposing in the open or reverberatory furnace, the immense volumes of muriatic acid gas and other deleterious vapours, which are disengaged or discharged into the atmosphere, become a public nuisance.

“ The improved construction of the apparatus for the



decomposition of common salt, and the condensation of the muriatic gas, consists, first, in a novel and peculiar construction of closed oven, or decomposing chamber, with its fire-places and flues composed chiefly of bricks and mortar. Within this oven, or decomposing chamber, there are two beds or floors, one about six inches lower than the other, and over them is formed an arch of fire-bricks, or of fire-tiles, placed obliquely, which arch separates the oven or chamber from the fire, and prevents the flame and smoke coming into contact with the materials under operation, but admits of sufficient heat for the purpose of decomposition. By this arrangement, the muriatic acid gas evolved from the salt and sulphuric acid, is separated from the smoke and gaseous products arising from the combustion of the fuel, and consequently is the more easily condensed."

After particularly describing the apparatus and the process, by references to the drawings annexed to the specification, the patentee concludes: — "Having thus described the nature of my invention, and the manner of carrying the same into effect, I would remark that I do not confine myself to the exact form and dimensions of the decomposing furnace shewn in the drawing, or in the construction of the arches, &c. But I claim as my invention, the improved construction of decomposing furnace, with the mode of applying the fire through a medium of fire-bricks, fire-tiles, or other fit and proper materials, in the manner as before described; thus separating the muriatic acid gas from the smoke and gaseous products arising from the combustion of the fuel," &c.

The plaintiff's specification, which was put in, began with the following statement: — "Instead of the brick furnaces hitherto employed for the decomposition of common salt, and for its conversion into sulphate of soda, I have found that iron retorts, constantly main-

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tained at an elevated temperature, may be advantageously substituted for that purpose, and the muriatic acid disengaged therefrom, effectually condensed by the receivers hereafter to be described." The specification then proceeded to describe the drawings annexed. The material parts of the descriptions were as follow:—

" Fig. 1. exhibits an elevation, and partly a section, of three furnaces or retorts of cast iron. A. No. 1. is a section of a furnace set in brickwork. On the bottom of A. Nos. 1. and 2. are laid flat iron plates, about an inch thick and five feet square, to protect the bottoms from the sudden changes of temperature caused by the introduction of the sulphuric acid. A. No. 2. is an elevation of a similar furnace without its brickwork. The furnaces A. A. may be named the decomposing furnaces, and B. the roasting or finishing furnace. Common salt is thrown on the bed of the furnaces A. A., through the doors C. C. The bottoms of the doors are elevated six inches above the bottoms of the furnaces, to guard against the flowing over of sulphuric acid. Each door has a sliding shutter, with an aperture at its lowest part, to permit the constant stirring of the materials. As soon as the furnaces and the salt contained therein are raised to a heat of  $290^{\circ}$  to  $300^{\circ}$  *Fahrenheit*, the proper proportion of sulphuric acid is added through pipe D. I prefer acid of 1.750 specific gravity. On the first addition of the acid, the workman commences with his rake, and keeps constantly stirring the materials till they become solid. *At this stage, the sulphate of soda is collected in front of the door, and pushed forward into the roaster B. through the inclined plane door E.* A second workman spreads the sulphate over the bottom of the roaster, and continues working it till all the gas is expelled, when it is drawn from the furnace into iron wheel-barrows, through the door F. It will be necessary to maintain the roaster B. at a heat uniformly sp-



proaching redness. As the above operation proceeds, the muriatic gas expelled from the salt, passes from each furnace, through their respective branch pipes G. G. G., into the main pipe H., and from H. it passes through pipe K. into first receiver. Fig. 2. is a plan of the three furnaces, shewing the branch pipes that attach them to the main pipe, and the connexion of the main pipe with first receiver."

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The specification then proceeded: —

"I do not claim the exclusive use of iron retorts; but I do claim as my invention, iron retorts worked in connexion with each other as above described, and also iron retorts constantly worked through a door open, or partly open, while the process is going forward, the draft of the chimney drawing in a portion of the external air, with the muriatic acid, into the receivers: neither do I claim the exclusive use of receivers filled with glass or pebbles; but I claim the use of receivers so arranged that the acid can pass from one to the other, or can be cut off at pleasure, when strong acid is required. I do not claim earthen stills as my invention; but I do claim, for my exclusive use, earthen stills with leaden heads, encased in iron, heated by the circulation of hot water, saline solutions, or by steam. I further claim my mode of changing the lime receivers, by which lime already in part saturated with chlorine, is exposed to the strongest gas, and the remnant of the gas is exposed to a surface of fresh lime. It will thus be perceived, that the receivers will be discharged alternately, and that the receiver which is stronger during one process, will be the weaker during the next."

On the 12th of *December*, 1844, the plaintiff, by leave of the attorney-general, entered the following disclaimer, pursuant to the statute 5 & 6 *W. 4. c. 83. s. 1.*: —

"I, the said *J. C. Gamble*, do hereby declare, that, in compliance with the proviso contained in the said Disclaimer.



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letters-patent, I duly inrolled a specification of my said invention, in the proper office belonging to the high court of Chancery, part of which said specification is in the words following, that is to say—‘I do not claim the exclusive use of iron retorts; but I do claim as my invention iron retorts worked in connection with each other as above described, *and also iron retorts constantly worked through a door open, or partly open, while the process is going forward, the draft of the chimney drawing in a portion of the external air, with the muriatic acid, into the receiver.* And I do hereby further declare, that, although I did not intend the words underlined [in italic] in the preceding paragraph to extend to any other retorts than the iron retorts described and shewn in my specification, viz. iron retorts worked in connexion with each other, in which the process is commenced in one retort, and finished in another retort; yet I have been informed by my legal advisers that the above-mentioned words have a doubtful meaning, and may be construed to extend to any iron retorts; for which reason, I am desirous to disclaim in my said specification the words in the claim thereof above referred to. And, for the reason aforesaid, I, the said J. C. Gamble, do hereby disclaim and omit in the claiming part of my said specification, the words ‘*and also iron retorts constantly worked through a door open, or partly open, while the process is going forward, the draft of the chimney drawing in a portion of the external air, with the muriatic acid, into the receivers;*’ which words are underlined in the extract from my said specification hereinbefore referred to.”

It appeared that the defendant had used, in the manufacture of sulphate of soda, two chambers, the one, composed of brick, for the decomposing, and the other, of iron, for the roasting or finishing process; the two being connected in a way similar to that described in the



plaintiff's specification, and each chamber being heated by a separate furnace. Evidence was also given on the part of the plaintiff, that the use of two chambers connected in the manner before described, and heated with separate furnaces, was unknown before the date of his patent.

On the part of the defendant, two witnesses stated that they had seen the manufacture of sulphuric acid carried on,—the one at *Berwick-upon-Tweed*, the other at *Manchester*, — by means of two separate chambers connected together by a spout about twelve feet long, through which the salt, when partially decomposed, was passed from the decomposing to the finishing chamber: and it was insisted, that, the exclusive use of iron retorts being claimed by the plaintiff, and confessedly old, and the use of brick not being claimed, the defendant had been guilty of no infringement of the plaintiff's alleged invention, even if it were new. The learned judge told the jury that they must find for the plaintiff, if they should be satisfied that the apparatus and process used by the defendant, were a mere colorable variation from those described by the plaintiff's specification; subject to the question of novelty.

The jury found for the plaintiff on the first, fourth, fifth, and sixth issues; and, as to the issues joined on the second and third pleas, they found "that the alleged invention of the use of two chambers, with separate furnaces, was not new, but that the plaintiff's mode of connecting them was new." Leave was reserved to either party to move to enter the verdict for him on this special finding; and also to the defendant to move to enter a demurrer, or a verdict for him on the first issue also, if the court should be of opinion that the use of two chambers, the one of iron, the other of brick, could not be an infringement of the plaintiff's patent right.

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*Channell*, Serjt., accordingly, in *Easter* term last, obtained a rule nisi to enter a verdict for the plaintiff on the second and third issues.

*Talfourd*, Serjt., also obtained a rule nisi to enter the verdict for the defendant on the first, second, third, and sixth issues, or for a nonsuit, or a new trial on the ground that the finding of the jury was not warranted by the evidence.

*Talfourd*, Serjt. (with whom was *Webster*), on a subsequent day in the same term, shewed cause against the plaintiff's rule, and was heard in support of the cross-rule.

*Channell*, Serjt. (with whom was *Cowling*), was heard on the other side.

*Cur. ado. vult.*

COLTMAN, J. (in the absence of *Tindal*, C. J.), now delivered the judgment of the court.

This was an action on the case for infringing the plaintiff's patent granted for "Improvements in apparatus for the manufacture of sulphate of soda, muriatic acid, chlorine, and chlorides."

The defendant pleaded not guilty; that the plaintiff was not the inventor; that the alleged invention was not new; and several other pleas, which it is not necessary to mention.

At the trial, before me, it was proved by the plaintiff that the apparatus commonly used for making sulphate of soda, was, a brick reverberatory furnace, consisting of a single chamber, with a fire at one end of it. The fire struck against the roof of the chamber, and was reflected down to the floor; and the smoke and gas passed out at the other end of the chamber. There



was also a patent called *Lutwyche's* patent, which was also a single chamber, one part of the floor of which was higher than the other. The whole was heated by the same furnace; and, when the materials had been decomposed on the lower part of the chamber, they were removed to the raised part, where the heat near the fire was greater than at the other end of the chamber, and there dried or roasted.

The plaintiff, in his specification, stated: "Instead of the brick furnaces hitherto employed for the decomposition of common salt, and for its conversion into sulphate of soda, I have found that iron retorts, constantly maintained at an elevated temperature, may be advantageously substituted for that purpose, and the muriatic acid disengaged therefrom effectually condensed by the receivers hereafter described." He then, by words and drawings, described his apparatus as consisting of two iron retorts, each having a separate furnace, one for decomposing the salt, and the other for roasting or finishing the sulphate of soda; and the materials, when decomposed, were to be pushed from one retort into the other along an inclined plane by which they were connected together. The specification then proceeded thus: — "As the above operation proceeds, the muriatic gas expelled from the salt, passes from each furnace, through their respective branch pipes, into the main pipe, and from that pipe, through another, into the first receiver." This part of the apparatus was also explained by drawings. At the end of the explanation, the plaintiff thus described his claim: — "I do not claim the exclusive use of iron retorts, but I do claim, as my invention, iron retorts worked in connexion with each other, as above described: neither do I claim the exclusive use of receivers filled with glass or pebbles; but I claim the use of receivers so arranged that the

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acid can pass from one to the other, or can be cut off at pleasure, when strong acid is required."

The defendant had used, for making sulphate of soda, two chambers, one of iron, and one of brick, connected by an opening through which the materials, when decomposed in one, could be pushed into the other, for roasting or finishing; each chamber being heated by a separate furnace.

For the plaintiff, a good deal of evidence was given to shew, that, until *his* patent was obtained, the use of two chambers with separate furnaces had not been known: but the defendant proved that a person at *Berwick* had previously used them, connected by a spout ten or twelve feet long, through which the materials, when partially decomposed, ran from one to the other, in which the soda was roasted or finished; and a similar process was proved to have been carried on by a manufacturer at *Manchester* in a similar way.

The jury found for the plaintiff on the issue of not guilty; and, as to the issues joined on the second and third pleas, they found "that the alleged invention of the use of two chambers with separate furnaces was not new, but that the plaintiff's mode of connecting them, was new."

Each party had leave to move to have the verdict entered in his favour on this special finding; and the defendant had leave to move to have the verdict entered in his favour on the first issue also, if the use of two chambers, one of iron, and the other of brick, could not be an infringement of the plaintiff's patent right; and, in *Easter* term, cross rules were accordingly granted.

The latter question was very little argued; and we are clearly of opinion that the verdict for the plaintiff on the issue of not guilty must stand; for, the essence of the plaintiff's improvement in making sulphate of soda was, the use of two chambers with separate furnaces



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the two stages of the process ; so that both could be in action at the same time, at the different temperature required for each stage : and that principle is fully acted upon, and the same advantage gained, whether both chambers are of iron, or one is of iron and one of brick. The material of which the chambers are composed, not being of the essence of the invention claimed, the patent right might be invaded, although the chambers used by the defendant were not of the material mentioned in the plaintiff's specification.

The other question depends upon what is the true meaning of the plaintiff's claim as an inventor. If he claimed the use of two chambers, with separate furnaces, as part of his invention, the jury have said that it was new, and the verdict should be entered for the defendant ; otherwise, for the plaintiff. It seems to us that no reasonable doubt can be entertained as to the claim made by the plaintiff. After describing by words and drawings the apparatus which he used, he claimed as his invention " iron retorts worked in connexion *with each other*, as above described." It was contended, on behalf of the plaintiff, that the meaning was, that he claimed the use of two retorts worked in connexion with the whole of the apparatus for condensing the muriatic acid gas. But the words of the specification are, " in connexion with each other," not in connexion with the condensing apparatus : and he afterwards goes on to claim, as his, the particular arrangement of receivers which he had previously described.

We can give no other meaning to this than that the plaintiff claimed, as part of his invention, the use of two chambers with separate furnaces, worked in connexion with each other, so that the materials might be decomposed in one, and then removed to, and roasted or finished in, the other ; and that the plaintiff understood such to be



1846. the lifetime of one *Henry Barrett*, since also de  
 ——— to wit, on the 4th of *July*, 1836, by a certain mer  
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 v. and subscribed by the defendants below and th  
 SCHWABE. *Henry Barrett* —after reciting that the said  
*Schwabe* was desirous of effecting an assurance w  
*Argus Assurance Company*, in the sum of 999*l.*, up  
 own life, and had signed and caused to be de  
 into the office of the said company, a declaration o  
 ment in writing, bearing date the 25th of *June*,  
 declaring that the age of the said *Louis Schwabe* c  
 exceed thirty-eight years, that he had been vacc  
 that he had not had the gout, that he had no  
 afflicted with asthma, fits, convulsions, spitting of  
 or rupture, and that he was not afflicted with a  
 order which tended to the shortening of life, a  
 the assured agreed that such declaration or sta  
 should be the basis of the contract between him a  
 said company; and further reciting that the said  
*Schwabe* had paid to the said company 17*l.* 2*s.* 6*d.*  
 premium for the assurance of the said sum of 99  
 twelve calendar months, commencing that day,  
 the said 4th of *July*, 1836, being the day on whi  
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 was thereby acknowledged —it was witnessed, th  
 three directors of the said company whose name  
 thereunto subscribed, to wit, the defendants belo

*and to appreciate the nature and quality of the act that he was doing, as a responsible moral agent; that the burthen of proof, as to his dying by a voluntary act, was on the defendants; but, that being established, the jury assume that he was of sane mind, and a responsible moral agent, unless the contrary should appear in evidence."*

Held, upon a bill of exceptions, that this direction was erroneous; that the terms of the condition included all acts of voluntary self-destruction; therefore, that, if *A.* voluntarily killed himself, it was immaterial whether or was not at the time a responsible moral agent — *dissentientibus Pollock and Wightman, J.*



he said *Henry Barrett*, who then were directors of the said company, and whose names then were subscribed to the said policy of assurance, did thereby agree, that, in case the said *Louis Schwabe* should die at any time within the term of twelve calendar months, commencing on the said 4th of *July*, 1836, and terminating on the 3rd of *July*, 1837, both inclusive; or, if the said *Louis Schwabe* or his assigns should, in the event of his living beyond the said term of twelve calendar months, pay or cause to be paid to the said company on or before the 4th of *July* in each and every subsequent year during the life of the said *Louis Schwabe*, the following premiums, that is to say, &c., the funds or property of the said company should, according to the provisions of the deed of settlement of the said company, be subject and liable to pay and satisfy, within three calendar months after satisfactory proof should have been received at the office of the said company, of the death of the said *Louis Schwabe*, unto his executors, administrators, or assigns, 999l.: provided always, that, if any thing averred by the said *Louis Schwabe* in the declaration thereinbefore mentioned to have been made by him, was untrue, that policy should be null and void, and all premiums and other moneys paid in respect thereof, should be forfeited to the said company: provided also that that policy, and the assurance thereby effected, were and should be subject to the several conditions and regulations thereupon indorsed, so far as the same were or should be applicable, in the same manner as if the same respectively were repeated and incorporated in that policy: Averment, that, at the time of the making and subscribing of the said policy as aforesaid, there were indorsed thereon the conditions and regulations following, that is to say — First: No policy shall be considered in force beyond twenty-one days after the expiration of the year, unless the premium then due, shall have been paid

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Conditions.



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 or was not at the time a responsible moral agent — *dissentientibus Pollock*  
 and *Wightman, J.*



the said *Henry Barrett*, who then were directors of the said company, and whose names then were subscribed to the said policy of assurance, did thereby agree, that, in case the said *Louis Schwabe* should die at any time within the term of twelve calendar months, commencing on the said 4th of *July*, 1836, and terminating on the 3rd of *July*, 1837, both inclusive; or, if the said *Louis Schwabe* or his assigns should, in the event of his living beyond the said term of twelve calendar months, pay or cause to be paid to the said company on or before the 4th of *July* in each and every subsequent year during the life of the said *Louis Schwabe*, the following premiums, that is to say, &c., the funds or property of the said company should, according to the provisions of the deed of settlement of the said company, be subject and liable to pay and satisfy, within three calendar months after satisfactory proof should have been received at the office of the said company, of the death of the said *Louis Schwabe*, unto his executors, administrators, or assigns, 999l.: provided always, that, if any thing averred by the said *Louis Schwabe* in the declaration thereinbefore mentioned to have been made by him, was untrue, that policy should be null and void, and all premiums and other moneys paid in respect thereof, should be forfeited to the said company: provided also that that policy, and the assurance thereby effected, were and should be subject to the several conditions and regulations thereupon indorsed, so far as the same were or should be applicable, in the same manner as if the same respectively were repeated and incorporated in that policy: Averment, that, at the time of the making and subscribing of the said policy as aforesaid, there were indorsed thereon the conditions and regulations following, that is to say — First: No policy shall be considered in force beyond twenty-one days after the expiration of the year, unless the premium then due, shall have been paid

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at the office of the company, or to some one of the agents of the company; but, should proof be given to the satisfaction of the board of directors, that the party or parties whose life or lives hath or have been assured, continue in good health, the policy may be revived at any period within six calendar months, on payment of a fine to be fixed by the board of directors, not exceeding 10s. per cent. on the sum assured, or at any time within twelve calendar months, on the payment of such fine as the board of directors may think reasonable — Second: Policies will become void, if the parties whose lives have been assured *shall die on the high seas*, except in passing, in decked vessels, or in steam-boats, from one part of the united kingdom of *Great Britain and Ireland*, to another part of the same kingdom, and to and from the islands of *Guernsey, Jersey, Alderney, Sark, and Man*; and also, in time of peace, in King's ships and packet or passage vessels or steam-boats, from or to any part of *Great Britain*, to or from any part of the Continent situate between *Hamburgh and Bordeaux*, both inclusive; or *shall go beyond the limits of Europe*, or, being or becoming military or naval men, shall be called into actual service; unless in each case of going upon the seas, or beyond the limits of *Europe*, or into actual service, permission shall have been granted by the board of directors, and such premium or premiums on account of the extra risk be paid as shall be required by the board of directors — Third: All claimants, upon the decease of any person whose life shall have been assured by the company, must, if required, make proof thereof, and give such further information respecting the same, as the board of directors shall require — Fourth: Reasonable proof will also be required of the time of the birth, unless the fact shall have been previously established, in which case the same will be admitted on the policy — Fifth: If the



age of any person whose life shall be assured by any policy, shall exceed the age stated in the declaration, the person assured thereby shall, except in case of fraud, be entitled under such policy to such a sum as would, according to the rate or rates at which the assurance was effected and continued on such policy, have been assured thereby for the annual or other premium or premiums actually paid in respect thereof, if the age of the person whose life shall be assured thereby was correctly stated in the declaration — Sixth: Every policy effected by a person on his or her own life shall be void, *if such person shall commit suicide, or die by duelling or the hands of justice*; but, if any policy effected by a person on his or her own life shall afterwards be actually assigned to any person or persons by way of mortgage, or for the benefit of any creditor or creditors, or charged with any sum or sums for the benefit of any mortgagee or mortgagees, or creditor or creditors, and the person on whose life the assurance shall have been effected shall commit suicide, or die by duelling or the hands of justice, then the policy so assigned or charged shall not be void to the extent of the principal sum or sums and interest secured by the assignment or charge; or, if any policy effected by any person on his or her own life shall afterwards be absolutely assigned to a purchaser for valuable consideration, in any transaction (except that of settlement upon or after marriage, or any other occasion), and the person on whose life the assurance shall have been effected shall commit suicide, or die by duelling, or by the hands of justice, then the policy so assigned shall continue in full force, notwithstanding such suicide or death — Seventh: To avoid all possibility of protracting or defeating equitable and just claims of the assured on the company, by the delay and expenses attendant on legal contests, it shall be competent for the assured, at all

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and then admitted on the said policy. [The declaration then set out four other policies of assurance, each bearing date the same day, and effected for the same sum as upon the same terms and conditions as the above Averment, that, within the term of twelve calendar months commencing on the 4th of *July*, 1844, and whilst the said several policies of assurance and each and every of them were and was in full force and virtue and before the 4th of *July*, 1845, to wit, on the 11th of *January*, 1845, the said *Louis Schwabe* died; whereupon more than three calendar months before the commencement of this suit, to wit, on the 10th of *March*, 1845, satisfactory proof was received at the office of the said company; and, although nothing averred by the said *Louis Schwabe* in the declarations in the said policies respectively mentioned to have been made by him, or in any or either of those declarations, was untrue; and although at the time of the said death, and thenceforth continually hitherto the funds and property of the said company for the time being remaining unapplied and undisposed of, and inapplicable to prior claims and demands in pursuance of the trusts, powers, and authorities in the said deed of settlement contained, were and had been and remained sufficient to satisfy and discharge all the several sums of money in and by the said policies of assurance respectively assured, and all other claims and demands of persons assuring with the said company, and the annuity-creditors of the said company; and although, after the death of the said *Louis Schwabe*, to wit, on the 12th of *April*, 1845, administration with the last will and testament of the said *Louis Schwabe*, deceased, annexed, &c., in due form of law was granted to the plaintiff in this behalf, — of all which premises the defendants below (having then survived *Barrett*), and the said company, before the commencement of this suit, to wit, on the 13th of *June*, 1845, had



nuities, or in respect of the directors who may have signed policies or instruments securing annuities, or any of their heirs, executors, or administrators, are the proprietors at large of the company to be answerable, indirectly or directly, further or otherwise than as to their respective shares, not subject to prior claims or demands, in the company's capital of 300,000*l.*; it being the true intent and meaning of the deed of settlement, that no claim upon any policy, or upon any instrument securing any annuity, shall be enforced against any one or more of the directors, his or their heirs, executors, or administrators, to a greater extent than the funds or property of the company. at the time of recovering upon such policy or instrument securing such annuity shall be competent to reimburse him or them: Averment, that afterwards, and in the lifetime of *Louis Schwabe*, and also in the lifetime of the said *Henry Barrett*, to wit, on the said 4th of *July*, 1836, in consideration that the said *Louis Schwabe*, at the request of the defendants below and *Barrett*, had then paid to the said company 17*l.* 2*s.* 6*d.* as a premium for the assurance of the said sum of 999*l.* for the said space of twelve calendar months commencing on the said 4th of *July*, 1836, and had promised the defendants below and *Barrett* to observe, perform, and fulfil all things in the said policy of assurance contained on the part and behalf of the assured, the defendants below and *Barrett* promised the said *Louis Schwabe* that all things in the said policy contained on the part and behalf of the assignees should be observed, performed, and fulfilled, according to the tenor and effect of the said policy: Averment of the due payment of the premiums in respect of the policy in each year down to and including the year 1844; and that, after the making of the policy, and in the lifetime of *Louis Schwabe*, to wit, on the 4th of *July*, 1836, the time of the birth of the said *Louis Schwabe* was established

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1846. the lifetime of one *Henry Barrett*, since also de  
 ——— to wit, on the 4th of *July*, 1836, by a certain me  
 CLIFT dum in writing called a policy of assurance, the  
 v. and subscribed by the defendants below and t  
 SCHWABE. *Henry Barrett* —after reciting that the said  
*Schwabe* was desirous of effecting an assurance v  
*Argus Assurance Company*, in the sum of 999*l.*, u  
 own life, and had signed and caused to be d  
 into the office of the said company, a declaration  
 ment in writing, bearing date the 25th of *June*  
 declaring that the age of the said *Louis Schwabe*  
 exceed thirty-eight years, that he had been vac  
 that he had not had the gout, that he had n  
 afflicted with asthma, fits, convulsions, spitting o  
 or rupture, and that he was not afflicted with  
 order which tended to the shortening of life, i  
 the assured agreed that such declaration or st  
 should be the basis of the contract between him  
 said company; and further reciting that the sai  
*Schwabe* had paid to the said company 17*l.* 2*s.* 6  
 premium for the assurance of the said sum of 9  
 twelve calendar months, commencing that day,  
 the said 4th of *July*, 1836, being the day on wl  
 said policy of assurance bore date, and terminal  
 3rd of *July*, 1837, both inclusive, the receipt  
 was thereby acknowledged — it was witnessed, t  
 three directors of the said company whose nam  
 thereunto subscribed, to wit, the defendants bel

*and to appreciate the nature and quality of the act that he was doing, as a responsible moral agent; that the burthen of proof, as to his dying by voluntary act, was on the defendants; but, that being established, the jury assume that he was of sane mind, and a responsible moral agent, unless contrary should appear in evidence."*

Held, upon a bill of exceptions, that this direction was erroneous; that the terms of the condition included all acts of voluntary self-destruction; therefore, that, if *A.* voluntarily killed himself, it was immaterial whether or was not at the time a responsible moral agent — *dissentientibus Pollock and Wightman, J.*



the said *Henry Barrett*, who then were directors of the said company, and whose names then were subscribed to the said policy of assurance, did thereby agree, that, in case the said *Louis Schwabe* should die at any time within the term of twelve calendar months, commencing on the said 4th of *July*, 1836, and terminating on the 3rd of *July*, 1837, both inclusive; or, if the said *Louis Schwabe* or his assigns should, in the event of his living beyond the said term of twelve calendar months, pay or cause to be paid to the said company on or before the 4th of *July* in each and every subsequent year during the life of the said *Louis Schwabe*, the following premiums, that is to say, &c., the funds or property of the said company should, according to the provisions of the deed of settlement of the said company, be subject and liable to pay and satisfy, within three calendar months after satisfactory proof should have been received at the office of the said company, of the death of the said *Louis Schwabe*, unto his executors, administrators, or assigns, 999l.: provided always, that, if any thing averred by the said *Louis Schwabe* in the declaration thereinbefore mentioned to have been made by him, was untrue, that policy should be null and void, and all premiums and other moneys paid in respect thereof, should be forfeited to the said company: provided also that that policy, and the assurance thereby effected, were and should be subject to the several conditions and regulations thereupon indorsed, so far as the same were or should be applicable, in the same manner as if the same respectively were repeated and incorporated in that policy: Averment, that, at the time of the making and subscribing of the said policy as aforesaid, there were indorsed thereon the conditions and regulations following, that is to say — First: No policy shall be considered in force beyond twenty-one days after the expiration of the year, unless the premium then due, shall have been paid

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at the office of the company, or to some one of the agents of the company; but, should proof be given to the satisfaction of the board of directors, that the party or parties whose life or lives hath or have been assured, continue in good health, the policy may be revived at any period within six calendar months, on payment of a fine to be fixed by the board of directors, not exceeding 10s. per cent. on the sum assured, or at any time within twelve calendar months, on the payment of such fine as the board of directors may think reasonable — Second: Policies will become void, if the parties whose lives have been assured *shall die on the high seas*, except in passing, in decked vessels, or in steam-boats, from one part of the united kingdom of *Great Britain and Ireland*, to another part of the same kingdom, and to and from the islands of *Guernsey, Jersey, Alderney, Sark, and Man*; and also, in time of peace, in King's ships and packet or passage vessels or steam-boats, from or to any part of *Great Britain*, to or from any part of the Continent situate between *Hamburgh and Bordeaux*, both inclusive; or *shall go beyond the limits of Europe*, or, being or becoming military or naval men, shall be called into actual service; unless in each case of going upon the seas, or beyond the limits of *Europe*, or into actual service, permission shall have been granted by the board of directors, and such premium or premiums on account of the extra risk be paid as shall be required by the board of directors — Third: All claimants, upon the decease of any person whose life shall have been assured by the company, must, if required, make proof thereof, and give such further information respecting the same, as the board of directors shall require — Fourth: Reasonable proof will also be required of the time of the birth, unless the fact shall have been previously established, in which case the same will be admitted on the policy — Fifth: If the



age of any person whose life shall be assured by any policy, shall exceed the age stated in the declaration, the person assured thereby shall, except in case of fraud, be entitled under such policy to such a sum as would, according to the rate or rates at which the assurance was effected and continued on such policy, have been assured thereby for the annual or other premium or premiums actually paid in respect thereof, if the age of the person whose life shall be assured thereby was correctly stated in the declaration — Sixth: Every policy effected by a person on his or her own life shall be void, *if such person shall commit suicide, or die by duelling or the hands of justice*; but, if any policy effected by a person on his or her own life shall afterwards be actually assigned to any person or persons by way of mortgage, or for the benefit of any creditor or creditors, or charged with any sum or sums for the benefit of any mortgagee or mortgagees, or creditor or creditors, and the person on whose life the assurance shall have been effected shall commit suicide, or die by duelling or the hands of justice, then the policy so assigned or charged shall not be void to the extent of the principal sum or sums and interest secured by the assignment or charge; or, if any policy effected by any person on his or her own life shall afterwards be absolutely assigned to a purchaser for valuable consideration, in any transaction (except that of settlement upon or after marriage, or any other occasion), and the person on whose life the assurance shall have been effected shall commit suicide, or die by duelling, or by the hands of justice, then the policy so assigned shall continue in full force, notwithstanding such suicide or death — Seventh: To avoid all possibility of protracting or defeating equitable and just claims of the assured on the company, by the delay and expenses attendant on legal contests, it shall be competent for the assured, at all

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times, if they shall think proper, to require the board of directors to submit the subject of dispute to two independent persons, one to be nominated by the board of directors, and the other by the assured; and the referees so nominated shall, previously to undertaking the reference, agree upon an umpire, whose decision shall be final between the parties, in case such referees disagree; but, if the assured shall have actually commenced a suit against the company, and shall afterward require a reference, it can only be consented to by the board of directors, upon condition of their being reimbursed the law expenses which they have previously incurred — Eighth: In all cases where any policy issued by the company shall, either originally, or at any time afterwards, be or become subject to any trust or trusts whatsoever, the receipt of the trustee or trustees for the time being, for the sum assured by such policy, shall, notwithstanding any equitable claim or demand whatsoever of the person or persons beneficially entitled to the policy, be an effectual discharge to the company, and the proprietors thereof — Ninth: According to the deed of settlement, the funds or property of the company for the time being remaining unapplied and undisposed of, and inapplicable to prior claims and demands, in pursuance of the trusts, powers, and authorities therein contained, are alone made answerable for the claims and demands of persons assuring with the company, and their annuity-creditors; and the directors signing the policies, or the instruments securing the annuities, are to be personally liable to the persons to whom the policies shall be given, or annuities granted, for the application of the said funds or property in discharge of the money secured by the policies, and of the said annuitants, and not further or otherwise; and neither in respect of the persons claiming under the said policies, or of the persons entitled to the said annuities.



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nuities, or in respect of the directors who may have signed policies or instruments securing annuities, or any of their heirs, executors, or administrators, are the proprietors at large of the company to be answerable, indirectly or directly, further or otherwise than as to their respective shares, not subject to prior claims or demands, in the company's capital of 300,000*l.*; it being the true intent and meaning of the deed of settlement, that no claim upon any policy, or upon any instrument securing any annuity, shall be enforced against any one or more of the directors, his or their heirs, executors, or administrators, to a greater extent than the funds or property of the company. at the time of recovering upon such policy or instrument securing such annuity shall be competent to reimburse him or them: Averment, that afterwards, and in the lifetime of *Louis Schwabe*, and also in the lifetime of the said *Henry Barrett*, to wit, on the said 4th of *July*, 1836, in consideration that the said *Louis Schwabe*, at the request of the defendants below and *Barrett*, had then paid to the said company 17*l.* 2*s.* 6*d.* as a premium for the assurance of the said sum of 999*l.* for the said space of twelve calendar months commencing on the said 4th of *July*, 1836, and had promised the defendants below and *Barrett* to observe, perform, and fulfil all things in the said policy of assurance contained on the part and behalf of the assured, the defendants below and *Barrett* promised the said *Louis Schwabe* that all things in the said policy contained on the part and behalf of the assignees should be observed, performed, and fulfilled, according to the tenor and effect of the said policy: Averment of the due payment of the premiums in respect of the policy in each year down to and including the year 1844; and that, after the making of the policy, and in the lifetime of *Louis Schwabe*, to wit, on the 4th of *July*, 1836, the time of the birth of the said *Louis Schwabe* was established



whilst the said several policies of assurance and every of them were and was in full force and and before the 4th of *July*, 1845, to wit, on the *January*, 1845, the said *Louis Schwabe* died; within more than three calendar months before the commencement of this suit, to wit, on the 10th of *March*, satisfactory proof was received at the office of the company; and, although nothing averred by the *Louis Schwabe* in the declarations in the said respectively mentioned to have been made by him any or either of those declarations, was untrue; although at the time of the said death, and thence continually hitherto the funds and property of the company for the time being remaining unapplied undispensed of, and inapplicable to prior claims and demands in pursuance of the trusts, powers, and authorities in the said deed of settlement contained and had been and remained sufficient to satisfy and charge all the several sums of money in and by the policies of assurance respectively assured, and all claims and demands of persons assuring with the company, and the annuity-creditors of the said company; and although, after the death of the said *Schwabe*, to wit, on the 12th of *April*, 1845, admission with the last will and testament of the said *Schwabe*, deceased, annexed, &c., in due form of law



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notice, and then were requested by the plaintiff below, as administratrix as aforesaid, to pay or cause to be paid to her, as administratrix as aforesaid, the said five several sums of 999*l.* each, in and by the said several policies of assurance respectively mentioned and assured; yet neither the defendants below, nor the said company, nor any or either of them, nor any person or persons on their or his behalf, did or would, then, or at any time, pay to the plaintiff below, administratrix as aforesaid, the same several sums of money in and by the said several policies of assurance mentioned and assured as aforesaid, or any or either of them, or any part thereof; and all the said several sums of 999*l.* each in and by the said several policies of assurance respectively mentioned and assured, were and remained wholly due and unpaid to the plaintiff as administratrix as aforesaid; contrary to the tenor and effect, true intent, and meaning of the said policies of assurance and the promises of the defendants below and *Barrett*, and to the damage of the plaintiff, as administratrix as aforesaid of 10,000*l.*, &c. Profert of the letters of administration.

The defendants below pleaded as follows: — “that, though true it is, that the said several policies of insurance in the declaration mentioned were so made, and that the defendants promised as in the declaration is mentioned, and that the said *Louis Schwabe* died as in the said declaration also is alleged; yet, for plea to the said declaration, the defendants say, that, after the making of the said several policies and the said promises respectively, to wit, on the 10th of *January*, 1845, the said *Louis Schwabe* did commit suicide; whereby the said policies respectively became and were void; and this the defendants are ready to verify” &c.

Upon this plea, issue was taken and joined.

The cause came on for trial before *Cresswell*, J., at the *Liverpool* summer assizes in 1845.



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On the part of the defendants below, it was proved that *Louis Schwabe*, the assured, on the 10th of *January*, 1845, voluntarily took and swallowed a quantity of sulphuric acid, sufficient to occasion death, for the purpose of killing himself, and that he died on the following day, by reason of the taking and swallowing of such acid; and the witnesses who gave such evidence, on cross-examination by the plaintiff's counsel, gave evidence tending to shew that *Louis Schwabe*, when he took the sulphuric acid, was of unsound mind.

The learned judge thereupon directed the jury — that, in order to find the said issue for the defendants — it was necessary that they, the jury, should be satisfied — that *Louis Schwabe* died by *his own voluntary act*, being — then able to distinguish between right and wrong, and — appreciate the nature and quality of the act that he was — doing, so as to be a responsible moral agent; that the — burthen of proof as to his dying by his own voluntary — act, was on the defendants, but, that being established, the jury must assume that he was of sane mind, and a — responsible moral agent, unless the contrary should appear in evidence.

To this direction, the counsel for the defendants below excepted, insisting that the learned judge ought to have charged the jury, as matter of law, that, if *Louis Schwabe* voluntarily took the sulphuric acid, for the purpose of destroying life, being conscious of the probable consequences of the act, and having, at the time of so taking it, sufficient mind to will to destroy life, he had committed suicide, within the meaning of the sixth condition of the policy.

The jury returned a verdict for the plaintiff below, damages 5140*l.* 13*s.* 9*d.* Judgment having been entered up for that sum, and costs, the defendants below brought a writ of error. The exceptions came on for argument in the Exchequer Chamber on the 4th of *December*,



1846, before *Pollock*, C. B., *Parke*, B., *Alderson*, B.,  
*Patteson*, J., *Rolfe*, B., *Wightman*, J., and *Coleridge*, J.

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*Sir F. Kelly*, Solicitor-General (with whom were *Martin* and *Unthank*), for the plaintiffs in error. (a) The learned judge was clearly wrong in the construction put by him upon the words of the condition in question — “every policy effected by a person on his or her own life, shall be void, if such person shall commit suicide, or die by duelling or the hands of justice.” The words “shall commit suicide” do not possess any definite technical meaning; the real question is, what was the meaning of the contracting parties — whether the office intended to provide against an event of frequent occurrence, or merely against the crime of felonious self-slaughter. The law upon the subject recently underwent very full discussion in the case of *Borradaile v. Hunter* (b). There, the policy contained a proviso, *inter alia*, that, in case “the assured should die by his own hands, or by the hands of justice, or in consequence of a duel,” the policy should be void. The assured threw himself into the *Thames*, and was drowned. Upon an issue, whether the assured died by his own hands, the jury found that he “voluntarily threw himself into the water, knowing

(a) The point marked for argument on the part of the plaintiffs in error, was — “that, according to the true construction of the expression in the sixth condition of the several policies ‘shall commit suicide,’ if the assured by his own voluntary act put himself to death, intending, at the time of committing the act, to cause his own death, and being conscious that such would be the probable effect of the means employed by

him for that purpose, the condition attached, and the several policies became forfeited, although, at the time of so killing himself, he might be of unsound mind, and incapable, by reason of such unsoundness, of distinguishing between right and wrong; and that the jury ought to have been directed accordingly.”

(b) 5 *M. & G.* 639., 5 *Scott*, *N. R.* 418.



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at the time that he should thereby destroy his life, and intending thereby to do so; but that, at the time of committing the act, he was not capable of judging between right and wrong." It was held by *Coltman, Erskine, and Maule, JJ., dissentiente Tindal, C. J.*, that the policy was avoided, as the proviso included all acts of voluntary self-destruction, and was not limited by the accompanying provisos to acts of *felonious* suicide. It may be conceded, that the word "suicide," in the sense in which it is here used, does not embrace self-killing by accident, or unintentional self-destruction. But there is nothing in the context to restrain it to a *felonious* killing. Suicide may be felonious or otherwise, according to the circumstances, just as homicide may be felonious, excusable, or justifiable. In 3 Inst., Lord Coke says (a) : "*Homicidium, ex vi termini*, comprehendeth petit treason, murder, and that which is commonly called manslaughter; for, *homicidium est hominis cædium*, and *homicidium est hominis occisio ab homine facta*. Therefore, the right division of homicide is, — that, of homicides or manslaughter, some be voluntary and of malice aforethought; as, petit treason, and murder of another, and murder of himself; of manslaughters, some be voluntary, and not of malice forethought: of these, some be felony, and some be no felony; of which, some be in respect of giving back inevitably in defence of himself, upon an assault of revenge, and some without any giving back, as, upon the assault of a thief or robber upon a man in his house or abroad: some, upon the assault of one that is under custody, as, the sheriff or gaoler assaulted by his prisoner. Some, in respect that he is an officer or minister of justice, without any assault, in execution of his office, or lawful warrant. And, lastly, some homicides that be no felony be neither forethought

(a) C. viii. p. 54.



**nor** voluntary, as, manslaughter by misadventure, *per infortunium*, or *casu*." In *Borradaile v. Hunter*, it was insisted, on the part of the plaintiff, at the trial, that, to bring it within the condition of the policy, the act of suicide, or "dying by his own hands," must have been the intentional act of a sane man, having the control of his will; but the learned judge who presided (a), laid it down — most unexceptionably, as it is conceived — "that, if the assured, by his own act, intentionally destroyed his own life, not only being conscious of the probable consequences of the act, but doing it for the express purpose of destroying himself voluntarily, having at the time sufficient mind to will to destroy his own life, the case would be brought within the condition of the policy: but that, if he was not in a state of mind to know the consequences of the act, then it would not come within the condition." Insurance offices do not guarantee a man's sanity. [*Pollock*, C.B. It would be easy for them to say so.] *Maule*, J., in his judgment in *Borradaile v. Hunter*, says: "A policy by which the sum insured is payable on the death of the assured in all events, gives him a pecuniary interest that he should die immediately, rather than at a future time, to the extent of the excess of the value of a present payment over a deferred one, and offers therefore temptation to self-destruction to this extent. To protect the insurers against the increase of risk arising out of this temptation, is the object for which the condition in question is inserted. It ought, therefore, to be so construed as to include those cases of self-destruction in which, but for the condition, the act might have been committed in order to accelerate the claim on the policy, and to exclude those in which the circumstances, supposing the policy to have been uncondi-

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(a) *Erskine*, J.

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tional, would shew that the act could not have been committed with a view to pecuniary interest. This principle of construction requires, and accounts for, the exclusion from the operation of the condition of those cases, falling within the general sense of its words, to which it is admitted not to apply — such as those of accident and delirium.” [Pollock, C. B. Delirium is not inconsistent with the existence of intention. The question is, whether, in order to exclude the case from the condition, there must not be an entire absence of will or intention and understanding. If the party is not a responsible moral agent, can the act be said to be his act? (a)] Erskine, J., in delivering his opinion, in *Borradaile v. Hunter*, says: “Looking simply at the branch of the proviso upon which the issue was raised, it seems to me that the only qualification that a liberal interpretation of the words, with reference to the nature of the contract, requires, is, that the act of self-destruction should be the voluntary and wilful act of a man having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act; and that the question whether at the time he was capable of understanding and appreciating the moral nature and quality of his purpose, is not relevant to the inquiry, further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself.” [Pollock, C. B. The effect of that dictum seems to be this; that the act must be the voluntary act of the party, as opposed to involuntary, and that it must be the act of a being sufficiently intelligent to know what he is

(a) His lordship referred to *Erskine's* defence of the prisoner, in *Hadfield's* case, *Howell's State Trials*, vol. xxvii. p. 1281. 1307., in terms of the highest eulogy.



doing.] If the party voluntarily ended his life, knowing that such would be the consequence of the act he was committing, and intending to produce that result, it is quite immaterial, in the construction of this condition, whether he was or was not a responsible moral agent. [Pollock, C. B. How can *intention* be predicated of a man *non compos mentis* ?] If the construction of the policy depended upon the sanity or insanity of the assured, there would have been no necessity for putting to the jury the question that was put by *Alexander, C. B.*, in *Garrett v. Barclay* (a); for, in his direction, his 'lordship observes that *beyond all doubt* the assured was insane. It is one thing to say that a man is not a responsible moral agent, and another to say that he is incapable of volition. In *Kinnear v. Borradaile* (b), as in *Garrett v. Barclay*, the words of the condition were the same as those in the present case. In *Kinnear v. Nicholson* (c), the words were the same as those in the policy in *Borradaile v. Hunter*; and yet, so slight was thought to be the distinction between them, that it was agreed between the parties that *Kinnear v. Nicholson* should abide the event of *Kinnear v. Borradaile*. [Pollock, C. B. Mr. Justice *Erskine* seems to have considered the difference of expression to be important: for, he says — "When I find the terms 'shall commit suicide,' that have been popularly understood and judicially considered as importing a criminal act of self-destruction, exchanged for terms not hitherto so construed, it may, I think, be fairly inferred that the terms adopted were intended to embrace all cases of intentional self-destruction, unless it be collected from the immediate context, that the

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(a) 5 M. & G. 643 (a)., (c) 5 M. & G. 644 (c).,  
 5 Scott N. R. 422. 645 (a)., 5 Scott N. R. 425.  
 (b) 5 M. & G. 644 (b).,  
 5 Scott N. R. 424.



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parties used them in a more limited sense." Two of the judges, therefore, in that case, would have been in favour of the plaintiff, if the words of the condition had been the same as those here used.] If the act be intentional, though the result of a perverted will, it is still suicide within the meaning of this policy. Lord Coke (a), Hale (b), Hawkins (c), and Blackstone (d), in treating of suicide, all consider the term applicable equally to self-slaying feloniously, or *per infortunium*, or otherwise. With regard to the rule of construction that was somewhat relied on by Tindal, C. J., in *Borradaile v. Hunter* — *noscitur a sociis* — even assuming it to be applicable here, it does not aid the argument; for, acts that are lawful, — such as going upon the high seas, or beyond the limits of *Europe*, — are in this proviso placed in juxta-position with unlawful acts. [Alderson, B. A man may die by the hands of justice, and yet he may not be justly condemned. (e)] Exactly so. Some force will also be attempted to be given to the word "commit," which, it will probably be said, implies criminality. There are, however, many instances of the use of that word in a manner in no degree importing criminality or illegality: for instance, in pleading, a man is said to *commit a trespass* in the assertion of a right of way, or to *commit an assault* in protection of himself or of some one he is bound to protect.

*J. Henderson* with whom were *Knowles* and *Crompton*), for the defendant in error. The main question in this case is, what is the true construction of the words "shall commit suicide," as used in this instrument. If

- (a) 4 *Inst.* c. 8.
- (b) *Hale, P. C.*, c. 31., pp. 411, 412.
- (c) *Hawk. P. C.* 68.
- (d) 4 *Bla. Com.* 189.
- (e) Suppose *A*, the subject

of insurance, to be executed after a *reprieve*, or by the mistake of the sheriff, who supposes him to be *B.*, the party really under sentence of death.



they necessarily import an act of criminality, the direction of the learned judge to the jury cannot be impeached. The word "suicide" is a word of comparatively modern introduction. Most of our text-writers use it as synonymous with *felo de se*. Thus, in *Hale's Pleas of the Crown* (a), it is said: "*Felo de se, or suicide, is, where a man of age of discretion, and compos mentis, voluntarily kills himself by stabbing, poisoning, or any other way. No man hath an absolute interest of himself: but 1. God Almighty hath an interest and property in him, and therefore self-murder is a sin against God. 2. The king hath an interest in him, and therefore the inquisition in case of self-murder, felonice et voluntarie seipsum interfecit et murdravit, contra pacem Domini Regis. If he loses his memory by sickness, infirmity, or accident, and kills himself, he is not felo de se, neither can he be said to commit murder upon himself or any other. If a man gives himself a mortal stroke while he is non compos, and recovers his understanding, and then dies, he is not felo de se; for, though the death completes the homicide, the act must be that which makes the offence. It is not every melancholy or hypochondriacal distemper that denominates a man non compos; for, there are few who commit this crime but are under such infirmities; but it must be an alienation of mind that renders them to be madmen or frantic, or destitute of the use of reason: a man killing himself in a fit of lunacy, is not felo de se.*" And he adds: "It must be simply voluntary, and with an intent to kill himself." So, Lord Coke says (b): "If a man lose his memory by the rage of sickness or melancholy, or otherwise, and kill himself while he is not compos mentis, he is not felo de se: for, as he cannot murder upon another, so in that case he cannot murder upon himself. If one during the time

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(a) 31. pp. 411, 412.

(b) 3 Inst. C. 8. p. 54.



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that he is *non compos mentis* give himself a mortal wound, whereof he, when he hath recovered his memory, dieth, he is not *felo de se*: because, the stroke which was the cause of his death, was given when he was not *compos mentis*: *et actus non facit reum, nisi mens sit rea.*" And *Blackstone* says (a): "A *felo de se* is he that deliberately puts an end to his own existence, or commits an unlawful malicious act, the consequence of which is his own death: as if, attempting to kill another, he runs upon his antagonist's sword; or, shooting at another, the gun bursts and kills himself. The party must be of years of discretion, and in his senses, else it is no crime." [*Alderson, B. Felo de se* no doubt is included in suicide; but the question is whether the expression here used is confined to criminal suicide or *felo de se.*] In *Dr. Johnson's Dictionary*, "suicide" is defined "self-murder; the horrid *crime* of killing oneself." Putting a fair and reasonable construction upon the whole of this instrument, it is impossible to hold that any thing short of a criminal act of self-destruction, was in the contemplation of the parties. The very form of the expression, to "commit suicide," imports a deliberate and rational exercise of the will: it is as if the words had been "commit the *crime* of suicide." In the eye of the law, an insane person can have no will or intention. The civil law, it is true, makes a distinction between *demens* and *furiosus*; but the law of *England* knows no degrees of insanity. "The law," as was observed by *Sir J. Jekyll*, in *The Duchess of Cleveland's* case (b), "will not measure the sizes of men's capacities, so as they be *compos mentis*." [*Pollock, C. B.* If a man is *non compos mentis*, he is beyond the reach of the law. How can it be predicated of one insane person that he is capable of willing

(a) 4 *Bl. Comm.* 189.

(b) Cited, *Howell's State Trials*, vol. xxvii. p. 1310.



to do an act, and of another that he is not? The imperfection of language compels us to use expressions that are very inapt. *Alderson, B.* An insane person is one who has no dominion over his will. (a)] The argument on the other side, — that the policy is avoided, if the assured, at the time of committing the act which terminated so fatally, had mind enough to know what he was about, and to contemplate and intend the consequence that resulted, — suggests a distinction which the law recognizes. [*Parke, B.* Lord *Hale* distinctly points out the degrees of insanity. (b)] The learned judge in this case adopted the test suggested by the opinion of the majority of the judges delivered to the House of Lords, in answer to the questions arising out of *M'Naughton's case*. (c) If any doubt arises from the ambiguity of the instrument, the inconvenience must be borne by the assurers, whose language it is. The opinions of two of the judges in *Borradaile v. Hunter*, upon the import of the words here used, support the direction in this case; and those of the other two are not at all inconsistent with it. The test there proposed by *Maule, J.*, is that which should guide the decision in the present case. "In construing these words," said that learned judge, "it is proper to consider, first, what is their meaning in the largest sense which, according to the common use of language, belongs to them; and, if it should appear that that sense is wider than the sense in which they must be understood in the instrument in question, secondly, what is the object for which they are used. They ought not to be extended beyond their ordinary sense, in order to comprehend a case within their object; for, that would

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an insane person, *demens parte tantum mentis er-  
ratur*), frequently exer-  
cising dominion over the will  
under the influence of hope and  
fear. The definition appears

to be more applicable to the case  
of the *furiosus* (*qui mentis ad  
omnia lumine caret*).

(b) 1 *Hale, P. C.*, c. 4. p. 29.

(c) *Vide* 8 *Scott, N.R.* 595.



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be to give effect to an intention not expressed; nor can they be so restricted as to exclude a case both within their object and within their ordinary sense, without violating the fundamental rule which requires that effect should be given to such intention of the parties as they have used fit words to express. The words in question, in their largest ordinary sense, comprehend all cases of self-destruction, and certainly include the case of the present testator; but, as it is admitted, that, in their largest sense, they comprehend many cases not within their meaning as used on the present occasion, it is to be considered whether the case of the testator falls within the object for which they are used in this policy." The cases of *Garrett v. Barclay*, *Kinnear v. Borradaile*, and *Kinnear v. Nicholson*, have little or no bearing upon the present. (a)

Sir F. Kelly, Solicitor-General, in reply. Lord Hale treats both suicide and homicide as including a killing *per infortunium*. As well might it be said that homicide, in the abstract, can only mean felonious homicide, as that suicide can only mean *felo de se*. If dictionaries are to be relied on, *Richardson* distinctly puts it in the alternative; for, he defines "suicide" as "the slaying of himself, or self-murder." The word "commit" clearly does not advance the argument on the part of the defendant in error. It is not necessarily confined to the doing a thing that is criminal or unlawful. [*Pollock*, C. B. Suicide *per infortunium* is clearly not intended by this policy. *Hale's* view excludes suicide by a reasonable man.] The whole extent of the doctrine laid down by *Hale*, is, that a man who is *non compos mentis*, cannot be *felo de se*.

*Cur. adv. vult.*

(a) And see *The Amicable Society v. Bolland*, *Schw. N. P.* 10th edit. p. 1033., 4 *Bligh, N. S.* 194., 2 *Dow & Cl.* 1.



There being a difference of opinion amongst the judges who were present at the argument, their judgments were given *seriatim*, as follows : —

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WIGHTMAN, J. I am of opinion, upon the best consideration I can give to this case, that the direction of the learned judge to the jury upon the trial of the cause was right, and that the deceased *Louis Schwabe* did not, under the circumstances found by the jury, commit suicide, within the meaning of the policy of assurance upon his life. The exception or proviso in the policy is in these terms : — “ Every policy effected by a person on his own life shall be void if such person shall commit suicide, or die by duelling or the hands of justice.” The defendants below pleaded that *Schwabe*, whose life was insured by himself, did commit suicide; which was denied by the plaintiff in the action. The evidence was, that the deceased voluntarily took poison in sufficient quantity to cause death, for the purpose of killing himself, but that he was, when he took the poison, of unsound mind. The learned judge told the jury, that, to find a verdict for the defendants below, they must be satisfied that the deceased died by his own voluntary act, being then able to distinguish between right and wrong and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent. To this direction a bill of exceptions was tendered, it being contended on behalf of the defendants, that it was sufficient to entitle them to a verdict, if the deceased had sufficient mind to intend to kill himself, and to know that the poison would probably have that effect, and that he took the poison with that intent, though he might be unable to distinguish between right and wrong, or to appreciate the nature and quality of the act he was doing, so as to be a responsible moral agent. The question therefore is, whether by the word “ suicide,”



1846. as used in the policy, a criminal killing of himself, such  
 — as could only be committed by a responsible moral  
 CLIFT agent, was intended ; for, if it was, the direction of the  
 v. learned judge and the verdict of the jury were right,  
 SCHWABE. otherwise not.  
 Wightman, J.

The term "suicide" has no technical or legal meaning: it is derived from the Latin: but the compound word "*suicidium*," from which the English word is said to be derived, is not to be found in any Latin dictionary or glossary, that I have met with. (a) It is admitted that the word is not to be understood in the largest sense of which it is capable, as that would include an accidental or unintentional killing of himself. We must, therefore, consider the ordinary meaning of the word in the English language, and connect such ordinary meaning with the apparent object and intent of the proviso in the policy in which it occurs. In all the English books in which it occurs, legal or other, it is almost invariably used to denote a criminal act. In *Johnson's Dictionary*, "suicide," when used as denoting an act, is said to mean, "self-murder," "the horrid crime of destroying oneself;" and, when used as denoting a person, is said to mean "a self-murderer." In *Webster's Dictionary* the same meaning is given: and so in *Rees's Encyclopædia*, and in the *Encyclopædia Britannica*. *Blackstone*, in the 4th volume of his *Commentaries*, p. 189,, uses the term "suicide" as meaning a *felo de se*. He says: "As the suicide is guilty of a double offence, one spiritual, and the other temporal, the law has ranked it amongst the highest crimes." Innumerable instances might be given to shew that the word "suicide" is almost invariably used in the English language in a criminal sense, and that such is the meaning of the word in its general and ordinary acceptation. If that

(a) In *suicidium* appears to i.e. in *subsidium*: *Ducange*, in  
 have been used for in *succidium*, *Verbis*.



be so, is there any thing in the policy, or the terms of it, to shew that it is used in the proviso in question, not in the general and ordinary sense, but in another, of which it is capable, though unusual.

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The word is used in a disqualifying proviso, by which, under certain circumstances, the insurance and the premiums paid are forfeited, and the benefit of the policy lost. The usual rule is, to look strictly at the terms of such provisos, and not to extend them beyond their ordinary meaning; but, in the present case, if the ordinary meaning of the term "suicide" were more uncertain than it seems to be, the terms used in the proviso itself, in connection with it, tend to shew the sense in which the insurers, whose word it is, intended it should be used. The policy is to be void, if the person "shall commit suicide, or die by duelling or by the hands of justice." The three excepted modes of death are classed together in one exception or proviso, and two of them are unquestionably the consequences of crime: and, if the maxim *noscitur a sociis* applies, it strongly tends to shew that the third is used in a criminal sense also. In *Borradaile v. Hunter* (a), which was cited upon the argument, *Erskine J.*, who agreed with the majority of the judges, says, as one of the grounds for his judgment in that case — "When I find the terms, 'shall commit suicide,' — that have been popularly understood and judicially considered as importing a criminal act of self-destruction, — changed for terms not hitherto so construed, it may, I think, be fairly inferred that the terms adopted were intended to embrace all cases of intentional self-destruction, unless it can be collected from the immediate context, that the parties used them in a more limited sense." And the Lord Chief Justice *Tindal*, in his judgment in the same case, says: "If the exception had run in the terms 'shall die

(a) 5 M. & G. 639., 5 Scott, N. R. 418.



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by suicide, or by the hands of justice, or in consequence of a duel,' surely no doubt could have arisen that a felonious suicide was intended thereby." I refer to these passages in the judgments of these learned judges, as shewing their understanding of the meaning of the term "suicide," when used in such an exception, and in connection with such other terms as occur in the present case.

I forbear to speculate upon the probable object of the insurers in introducing such a proviso. It can hardly be because such modes of death as these excepted, are events not to be calculated upon; for, there is no doubt but that the probabilities of such events are as well calculated as any other; and, moreover, those modes of death are not excepted where the policies are for the benefit of others. It may be that the exception in case of suicide was introduced to meet the case of a person insuring his life with the intention of committing suicide, in order to benefit his family; or, it may be that the insurers were influenced by some higher motive, and wished to check such modes of death as those excepted. Either of these objects would seem to indicate that the word suicide was used in its ordinary sense, importing a crime. But, as no satisfactory result can be drawn from such a speculation, it is better to judge of the case merely by the ordinary sense of the language used in connection with the other terms which are used along with it. Upon the whole, then, it seems to me that there is nothing in this case to shew an intention on the part of the insurers to use the word "suicide" in a more extended sense than that which is ordinarily and popularly attributed to it; and that, on the contrary, the context shews that it was their intention to use it in the ordinary and popular sense, and that they have so used it; and, consequently, that the direction of the judge was correct, and that the defendant in error is entitled to judgment.



ROLFE, B. The question in this case is very short. *Louis Schwabe*, in the year 1836, insured his own life for 999/., in an office of which the plaintiffs in error were the directors liable to be sued for money becoming due on the policies of insurance. The policy by which the 999/., was insured, contained a clause in these words: — “ Every policy effected by a person on his own life, shall be void, if such person shall commit suicide, or die by duelling or the hands of justice.” *Schwabe* died in 1845, and the defendant in error obtained letters of administration, and then sued the plaintiffs in error in action of assumpsit for the 999/., secured by the policy. The plaintiffs in error pleaded that *Louis Schwabe* did commit suicide, whereby the policy became void. On this issued was joined. The issue was tried before my brother *Cresswell*, at the *Liverpool* summer assizes last year; and, on the part of the plaintiffs in error, witnesses were called to prove that *Schwabe*’s death was caused by his having voluntarily, and for the purpose of killing himself, swallowed a quantity of sulphuric acid; and the same witnesses also gave evidence tending to shew, that, at the time of his so swallowing the said sulphuric acid, *Lewis Schwabe* was of unsound mind. My brother *Cresswell*, in summing up the case to the jury, told them, that, in order to find the issue for the plaintiffs in error, they must be satisfied that *Schwabe* died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act he was doing, so as to be a responsible moral agent. To this ruling the plaintiffs in error have excepted; and we have therefore to say whether that ruling was right; and this depends on the meaning of the words in the policy “ *shall commit suicide.*” If they mean, shall destroy his own life under circumstances which will make him a “ *felo de se,*” then the ruling was right: if they

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mean merely "*shall intentionally kill himself*," then the ruling was wrong.

The word "suicide" is not, as it appears to me, a word of art, to which any legal meaning is to be affixed different from that which it is popularly understood to bear. The authorities referred to by the defendant in error, as shewing that suicide means the felonious taking away of a man's own life, do not at all bear out his proposition. Lord *Hale*, indeed, in the thirty-first chapter of his *Pleas of the Crown*, Vol. I. p. 411., certainly speaks of *felo de se* and suicide, as convertible terms, and defines both the one and the other as being, where a man of the age of discretion, and *compos mentis*, voluntarily kills himself. But it appears to me plain from the whole context of the passage in question, that Lord *Hale* did not understand that he was giving a *definition* of the term suicide, except as it was often used to mean the same thing as *felo de se*; and this seems manifest from the fact, that, what in the passage in question he calls suicide, he a few lines above designates as *homicidium sui ipsius*. Now, there can be no doubt but that a man who takes away the life of another, commits *homicide*, even though the act was justifiable, or may have happened entirely "*per infortunium*," and was, therefore, not criminal at all; see *Hale P. C. c. 39*. And, therefore, taking suicide as meaning the same thing as homicide of one's self, it seems to follow, that, in the opinion of Lord *Hale*, neither guilt nor moral responsibility is necessarily involved in its legal definition.

The passage to which we were referred in 4 Bla. Com. 189., seems strongly to shew that suicide does not, in the opinion of that learned judge, necessarily include the notion of moral responsibility. The learned commentator, after stating that the party who destroys himself is not *felo de se*, unless he was in his senses, adds, that coroners' juries are apt to push this principle too



far, and to hold that the very act of *suicide* is evidence of insanity. It is plain that the word suicide is there used as designating the mere act of self-destruction; otherwise, the passage would be insensible.

The only other authority referred to, in which the word suicide occurs, is the recent case of *Borradaile v. Hunter* (a), which was an action, like this, on a policy of insurance, in which was a stipulation making it void, not, as in this case, if the party should commit suicide, but, if he should "die by his own hands." There, a majority of the court held that the assured, having intentionally destroyed himself, though he was at the time incapable of distinguishing between right and wrong, the policy was void. *Tindal*, C. J., differed from the rest of the court; and, at p. 668 of his judgment, the following passage occurs: "The expression dying by his own hand, is in fact no more than the translation into English of the word of Latin origin 'suicide:' but, if the exception had run in these terms — 'shall die by suicide, or by the hands of justice, or in consequence of a duel,' surely no doubt could have arisen that a *felonious* suicide was intended thereby." This, though it certainly shews that *Tindal*, C. J., would, from the context, have interpreted the word suicide in this policy as he did the words "die by his own hands," in *Borradaile v. Hunter*, as referring only to cases of self-destruction perpetrated by persons of sound mind, yet shews also that he did not think that to be the necessary or natural meaning of the word suicide, standing alone. The distinction between felonious suicide and suicide not felonious, taken and observed on by that learned judge, seems conclusively to shew, that, in his opinion, *suicide* did not necessarily, *ex vi termini*, import a criminal act, and therefore the

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Rolfe, B.

(a) 5 M. & G. 689., 5 Scott, N. R. 418.



1846. act of a responsible moral agent; and in the same case  
 — near the bottom of page 688, *Erskine*, J., speaks of  
 CLIFT *criminal* suicide, shewing that he took the same view of  
 the meaning of the word suicide as was taken by the  
 SCHWABE. lord chief justice. All these authorities seem to me to  
 Rolfe, B. favour my interpretation of this word.

But, after all, our decision must rest entirely on what is the ordinary meaning of the term. In my opinion, every act of self-destruction is, in common language, described by the word suicide, provided it be the intentional act of a party knowing the probable consequence of what he is about. This is, I think, the ordinary meaning of the word; and I see nothing in the context enabling me to give it any but its ordinary signification.

For these reasons, I think that a *venire de novo* must be awarded.

PATTESON, J. (a) The sole question is, what is the true meaning of the words "commit suicide," in the policy in question.

It is argued, first, that these words have a technical meaning, and import a felony.

No authority is cited for this position: no case in which the finding of a jury that *A.* had "committed suicide," has been held equivalent to a finding that *A.* had "murdered himself," or that *A.* was "a felon of himself." I apprehend that the word "*murdravit*" was as necessary in a case of *felo de se*, as in the case of the murder of another person; and, unless some records could be found, or some decisions of the courts, in which the word "suicide" has been held to have the same meaning as "self-murder," I am at a loss to know what ground there is for saying that the words "commit suicide" have any *technical* meaning.

(a) Coleridge J., was absent. concurred in opinion with the  
 He had heard the argument, and majority of the judges.



It is argued, secondly, that the words, in their ordinary acceptation, import felony.

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Now, the word "suicide," literally translated, means only "killing himself or herself:" the circumstances attending the act manifestly cannot affect the literal meaning of the word.

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Reference is made to *Hale's Pleas of the Crown* (a), where Lord *Hale*, in speaking of the different kinds of murder, speaks of suicide — *felo de se*. No doubt, he does; but he is treating of criminal suicide only; and he nowhere intimates that the word "suicide" in itself imports criminal suicide. *Johnson's* dictionary, and *Richardson's* dictionary, are also referred to: but they are of very little weight when the court is considering what the parties to a contract mean by the words they have used. The word "commit" is said always to be used in a bad sense: be it so; but, how does that prove that it communicates the quality of felonious to the word "suicide?" No suicide is good or meritorious; it must always be spoken of in a bad sense, however pitiable, or, one may hope, excusable, the circumstances of it may be.

But it is argued, thirdly — which is the true question — that a felonious suicide only is pointed at by this policy, and that this appears by the words themselves, and by the context.

Now, the words themselves are large enough to embrace all self-destruction, as well as self-murder: not indeed, as was admitted in *Borradaile v. Hunter*, to embrace cases of mere accident, or of insanity extending to unconsciousness of the act done, or of its physical consequences; because such cases, although comprehended in the very words themselves, cannot be considered to have been in the contemplation of the con-

(a) Cap. 31. p. 411.



by his own hands, or by the hands of justice, or  
sequence of a duel," so that the verb "die" ap  
all the members of the sentence, whereas, h  
words "commit suicide" are complete as a s  
without any word taken from the other par  
not know that this makes any difference. It  
that the other two modes of death appear to  
nected with felony: yet I apprehend that th  
felony is no part of the cause of exception from  
If it were, it would be competent to the plaintiff  
that the deceased, although dying by the hand  
tice (*a*), was, in truth, innocent of the crime for  
suffered; in the same manner as it is, no doubt,  
tent to an executor to traverse an inquest of *fe*  
found upon view of the body of his testator, by a c  
jury; or, that the deceased, although killed if  
had fired his pistol in the air, and never contr  
shooting at his opponent. Such defences woul  
be excluded; for, the words of the exception are  
—"die by the hands of justice," whether justly o  
"or by duelling," whether it were felony or  
seems, in truth, that the exception is not fran  
reference to the commission of any felony or  
but to guard against the time for payment of  
insured being accelerated by the voluntary ac



quality of the act done. That the voluntary act of the party interested, — and not the felony, — is the thing contemplated by the exception, is further apparent from this circumstance, that the clause in the policy goes on to do away with the exceptions altogether, when the deceased has parted with all interest, either for himself or his family, by assigning the policy, and, where the deceased has mortgaged or charged it for the benefit of creditors, to do away with the exception to the extent of the sum secured; yet felony would be committed in those cases just as much as if the policy had not been assigned.

I do not inquire into the reason of this qualification of the exception in the policy, — whether it has any thing to do with the removal from the deceased of temptation to destroy himself when he has parted with his interest, or not; or whether it is inserted as an inducement to those who want to raise money, to effect policies at this office; or what other reason may be conjectured. It is sufficient, for my purpose, that it tends to shew that the contracting parties did not regard the commission of felony, as such, in their contract.

Upon the whole, I am of opinion that the words “commit suicide” mean only “kill himself;” and that the true question to be put to the jury is that which was put by *Erskine, J.*, in *Borradaile v. Hunter* — whether the deceased knew the probable consequences of his act, and did that act voluntarily, intending such consequences to follow; and that no question should be put as to the act done being criminal or not.

It follows, that, in my opinion, the judgment must be reversed, and a *venire de novo* awarded.

ALDERSON, B. I also am of opinion that there ought to be a *venire de novo* in this case; and I shall say but a very few words upon the points raised.

The true principle governing cases of this sort seems

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to be very well laid down by my brother *Maule* in *Borra-daile v. Hunter*. The words in question seem to me in this case to have their proper construction, when taken as *including* all cases of voluntary self-destruction. They do not apply to cases in which the will is not exercised at all; as, where death results from accident or delirium — but where the self-destruction is voluntary, although the will may be perverted. It seems to me, therefore, that the argument arising out of the peculiar use of the word “suicide” in this contract, is fallacious; and that the word is often used in its most extended sense, than namely, which has been assigned to it on behalf of the plaintiffs in error. For instance, to take so common a book as the *Encyclopædia Britannica*, under the head of “Suicide,” I find this observation: “The general causes of suicide are twofold — insanity, and crime.” So that the word “suicide” has often, in its ordinary acceptance in the English language, that enlarged sense; and it is not, therefore, to be confined to cases of criminal intention alone. Then, reliance is placed upon the words in the company of which the word “suicide” is found in the policy — “death by duelling or by the hands of justice.” I doubt, however, whether the argument carries the case much further. Suppose a person insured were to die in a duel, I do not conceive it would be competent to his representatives to say that he was insane at the time. Cases may easily be suggested in which a duel might be fatal, and yet not felonious; such as, a duel in the course of war, or the like.

The case, however, has been so fully gone into by those learned judges who have immediately preceded me, that I shall do no more than express my concurrence with their judgments.

PARKE, B. The question in this case may be very shortly stated. By the terms of the policy, all the con-



ditions and regulations indorsed, are incorporated in it; and one of those, the sixth, is, that every policy effected by a person on his own life, shall be void, if such person shall commit suicide, or die by duelling or the hands of justice: and there is a plea, that the intestate did commit suicide.

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On the trial, my brother *Cresswell* told the jury, "that, in order to find the said issue (a) for the defendants, it was necessary that the said jury should be satisfied that *Schwabe* died by his own voluntary act, being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent; that the burthen of proof as to his dying by his own voluntary act, was on the defendants, but, that being established, the jury must assume that he was of sane mind, and a responsible moral agent, unless the contrary should appear in evidence."

The question is, whether this direction was correct. I agree with the majority of the judges who have preceded me, that part of the direction, viz. that as to the necessity of his being a responsible moral agent, was wrong; for, I think, that, according to the proper construction of this policy, if the intestate *voluntarily* killed himself, it was immaterial whether he was then sane or not.

This being a written contract between the parties, the construction of it belongs to the court; and the court must adopt the usual rules, and construe the provisos or conditions, as well as the other parts of the instrument, according to the ordinary meaning of the language used; except that terms of art, or technical words, must be understood in their proper sense, unless the context controls or alters their meaning: antient words may be explained by contemporaneous usage;

(a) The issue joined on the second plea.

" " "



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and words which have acquired a peculiar sense, by usage, in particular districts, occupations, or trades must be read (the usage being found by the jury) in their acquired sense.

Here, there is no occasion for any of these exceptions in construing this instrument. The two latter are inapplicable; and there is no ground for saying that the word "suicide" is a legal technical term, or word of art. An inquisition stating that the deceased committed suicide, would be clearly informal and bad. Nor have we a decision of any court on the meaning of these precise words, by which we should consider ourselves bound. The case of *Borradaile v. Hunter* (a) certainly is not such; nor can the intimation of the opinion of the Lord Chief Justice *Tindal*, by way of illustration of his argument, as to the meaning of the expressions now under consideration, have the same effect as a decision.

The whole question resolves itself into an inquiry as to the sense of words used in the ordinary language of the present day, the instrument to be construed bearing date in the year 1836; and we are all perfectly competent to form an opinion upon such a subject, and need not refer to lexicographers, or authors, ancient or modern. If the case depended on the explanation given by dictionaries, the result, nevertheless, would be the same. *Johnson*, indeed, explains the word "suicide" by "self-murder, the horrid crime of self-murder" — which, no doubt, it includes; *Webster*, as both "self-murder" and "the act of designedly destroying oneself," and adds, to constitute suicide, the person must be of years of discretion, and refers to *Blackstone*, inaccurately (b); for, the passage in that author (c) applies to

(a) 5 M. & G. 639., 5 Scott, N. R. 418.

(b) Except upon the supposition that the author considered "suicide" and "felonious self-

destruction," — as was, in this case, contended by the plaintiff below, — to be, in truth, convertible terms.

(c) Vol. IV. p. 189.



person being *felo de se*; *Richardson*, who states them to be words of modern formation, as “the slaying of himself, or self-murder.” But the question does not depend upon the opinion of such authors; for, though they are authorities, they are not conclusive: the case turns on the meaning of the vernacular language which we now use; and I must own that I feel no doubt as to the import of the expression “commit suicide.” In ordinary parlance, every one would so speak of one who had purposely killed himself, whether from *tædium* of life, or transport of grief, or in a fit of temporary insanity. To die by his own hands, or to commit suicide, seems to me to be all one, and to apply to all cases of voluntary self-homicide; and I do not see any reason why a different sense to the ordinary one should be attributed to these words in this instrument: on the contrary, I see very good ground for believing that they are used in their ordinary sense, in order to avoid the consequence which would have followed the adoption of such words as “committing felony of himself,” or “self-murder;” as it may be well supposed that juries would, in favour of the family of the deceased, take the same lax view of the evidence as coroners’ juries generally do.

I think that the judgment ought to be reversed, and a *venire de novo* awarded.

POLLOCK, C. B. I regret that I differ from the majority of the court who have already delivered their opinions: but, as, after the fullest deliberation, I feel compelled to come to the conclusion that the direction of my brother *Cresswell* to the jury at the trial, was correct in point in law, and that the plaintiff below is entitled to our judgment, it is my duty, with whatever reluctance and hesitation, to state my own view of the case, and the reasons upon which that conclusion is founded.

The question, in point of form, has been so clearly

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stated already, that it is unnecessary to state it again but, in substance, it is, what is the meaning of the words "*commit suicide*" in the policy in question? — does the expression mean and include that the party was *compos mentis*? that he was a responsible being, capable of distinguishing right from wrong, — as stated by my brother *Cresswell*? or, is the expression applicable to a person who *intentionally* produces his own death (that is, uses the means of destruction, *with* a knowledge of the effects they will produce, and *with* the intention of producing them), but whose understanding, or judgment, or will, is so perverted by disease that he has ceased to be responsible criminally for his conduct? — in short, who is insane (possibly) upon every other point but the physical effects of using a deadly weapon, or the result of applying adequate means to produce the destruction of life?

In considering the question, every thing turns on the meaning of the words as ordinarily occurring in the English language and in English authorities, and especially in books written on law or morals.

Now, what is the meaning of the word "*suicide*," merely as an English word, according to the best authorities? Does it mean the killing of one's self, in the same way as "*homicide*" means, simply, the killing of a human being — whether by accident, negligence, or in self-defence? or, does it imply a *criminal* taking away of one's own life?

The word is of modern origin: it does not occur in the Bible, or in any English author before the reign of *Charles II.*; probably, not till after the reign of *Anne*. As far as I have been able to trace it, it first occurs as an English word in *Hale's Pleas of the Crown*. *Hale* was a judge during the Commonwealth (*a*), and died in

(*a*) He was also Chief Justice of the Common Pleas. Baron (1660), and Chief Justice (1671), after the Restoration.



1676. His work was published in 1736. It is not in *Hawkins*, first published in 1716: but it is to be found in *Blackstone*. These, as legal authorities, will be adverted to presently; but I wish to notice first the authorities not legal.

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The meaning assigned to the word by *Johnson*, in his dictionary, is, “self-murder — the horrid crime of destroying one’s self — a self-murderer;” and he gives no other signification. In *Richardson’s* dictionary it is, “the slayer of himself;” also, “the slaying of himself — self-murder.” In the *Dictionnaire Universel* of the French language, published in 1771, it is said that the word was introduced into the French language by the *Abbé Desfontaines*; and a quotation is given from his works, where it is manifestly used in the sense given to it by *Johnson*. *Desfontaines* was born in 1685, and died in 1745.

In the year 1644, was published with the works of *John Donne* (the poet), dean of *St. Paul’s*, who died in 1631, his “*βιαθавατος*, a Declaration on that Paradox or Thesis that *self-homicide* is not so naturally Sin, that it may never be otherwise.” The word “*suicide*” does not occur in this work; from which it may be presumed that it was not then in general use, and perhaps was not in use at all.

In 1785, Archdeacon *Paley* published his work on *The Principles of Moral and Political Philosophy*. The third chapter of book iv. is on “*Suicide*.” Throughout that chapter the word is used as denoting the act of a reasonable, moral, and responsible agent; and in no other sense.

In 1790, *Charles Moore*, M. A., rector of *Cuxton*, in *Kent*, published “*A full Enquiry into the Subject of Suicide*; to which are added (as being closely connected with the subject,) two Treatises on Duelling and Gaming.” Page 4. contains the following passage: “There



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are points, then, to be settled, and exceptions to be made, previous to a general charge of guilt on all who put a sudden end to their own lives. For, though every person who terminates his mortal existence by his own hand, commits *suicide*, yet he does not therefore always commit murder, which alone constitutes *it* guilt. Some distinction is necessary in regard to a man's killing himself, as it would be had he killed another person; which latter he may do either inadvertently or legally, and therefore, in either case, innocently, and without the imputation of being the murderer of another. When a man kills himself inadvertently or involuntarily, it comes under the legal description of accidental death, or *per infortunium*; but, as to his doing it *legally*, the law allows of no such case. The only instance of innocence which it allows to the commission of voluntary suicide, is in the case of madness; when a man, being deemed under no moral guidance, can be subject to no imputation of guilt on account of his behaviour to himself or others."

In the *Encyclopædia Britannica*, the explanation of the word "*suicide*," is, "the crime of self-murder," or "the person who commits it." There is a treatise on law, in the *Encyclopædia Metropolitana*, in which *suicide* is spoken of: it is in the 2nd volume of pure sciences (a), "On Offences against Self." Speaking of the cases where society may interfere to prevent or punish, the writer says: "This observation applies to suicide — the greatest offence a man can commit against himself."

These are all the lay authorities I think it necessary to refer to. But there are *legal* authorities, which, if unopposed by other and greater authorities, I should deem binding and conclusive upon the subject, in a court of law.

(a) Page 711.



the work already alluded to, defines *felo de se*, to be “where a man of the age of discretion, voluntarily kills himself, by poison, or any other way.” Judge *Blackstone*, Commentaries, first published in 1765-1768, uses in connection with self-murder, and in the case *Hale* (a). In *Burn’s Ecclesiastical Law*, published in 1760, it is said (b): “By the rubric of the burial office, persons who have laid violent hands on themselves, shall not have that office used at their interment. And the reason thereof given by the rubric is, because they die in the commission of a crime; and therefore this extendeth not to idiots, or persons otherwise of insane mind, as, children under the age of discretion, or the like. So also not to those who do it involuntarily, as, where a man kills himself by accident; for, in such case, it is not their fault, but their very great misfortune.” The 4 Geo. 2. c. 2. refers only to *felo de se*: but the editor says, “Persons who are to be buried in the churchyard at night; and service is to be performed over them.” In *Jacob’s Dictionary*, in the edition of 1772, under title “Self-murder;” it is said that “self-murder is ranked amongst the heinous crimes, being a peculiar species of felony — committed on one’s self. The party must be of legal age, else it is no crime. In this, as well as all other crimes, the offender must be of the age of discretion, and *compos mentis*; and, therefore, an infant, or a person under the age of discretion, or a lunatic, or one in a state of lunacy, cannot be a *felo de se*.” *Blackstone* says, “Self-murder, the pretended heroism, but real cowardice, of the stoic philosophers, who destroyed themselves, to avoid those evils which they had not

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(a) *Bl. Comm.* p. 189.

(b) Tit. “Suicide.”



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 ——— be countenanced by the civil law (a), yet was punished,  
 CLIFT by the Athenian law, with cutting off the hand which  
 r. committed the desperate deed. (b) And also the law of  
 SCHWABE. *Pollock, C. B.* England wisely and religiously considers that no man  
 hath a power to destroy life, but by commission from  
 God, the author of it: and, as the *suicide* is guilty of a  
 double offence — one spiritual, in invading the prero-  
 gative of the Almighty, and rushing into his immediate  
 presence uncalled for — the other temporal, against the  
 King, who hath an interest in the preservation (c) of all  
 his subjects; the law has therefore ranked this among  
 the highest crimes, making it a peculiar species of felony  
 — a felony committed on one's self. A *felo de se*, there-  
 fore, is he that deliberately puts an end to his own exist-  
 ence, or commits any unlawful malicious act, the conse-  
 quence of which is his own death: as, if, attempting to  
 kill another, he runs upon his antagonist's sword; or,  
 shooting at another, the gun bursts, and kills himself. (d)  
 The party must be of years of discretion, and in his  
 senses, else it is no crime."

It should seem, therefore, that the word has never  
 been used by law writers, except in the sense of a  
 criminal taking away of one's own life: at least, I am  
 not aware of any instance in any law writer, of its use  
 in any other sense.

It may be presumed that the word is of *legal* intro-  
 duction, and was perhaps first taken from the law  
 writers by Archdeacon *Paley*. It has since become a

(a) " *Si quis impatientiâ  
 doloris, aut tædio vitæ, aut  
 morbo, aut furore, aut pudore  
 mori maluit, non animadver-  
 tatur in eum.*" *Dig. lib. 49.  
 tit. 16. l. 6.* And see *Bynkers-  
 hoek, Observ. Jur. Rom. lib. 4.  
 c. 4.* *Περὶ Αὐτοχειρίας.*

(b) *Pott. Antiq. b. i. c. 26.*

(c) Rather, in the retention  
 of each of his subjects, for the  
 benefit of himself and his other  
 subjects; as, otherwise, the rule  
*unusquisque potest renunciare  
 juri pro se introducto*, would  
 seem to apply.

(d) 1 *Hawk. P. C.* 68., 1  
*Hale, P. C.* 413.



word of general use: but I am not aware of any authority by which it can be shewn that it has lost the meaning to express which it was originally framed, or adopted from some other language. And I think it is clear, that, although it may possibly sometimes admit, in modern times, of a more loose and vague interpretation, it certainly *may* mean self-destruction by a person *compos mentis*, and morally responsible for his acts: and the question is, whether *that* meaning is or is not what was intended by the parties to this contract.

Now, in this policy, I find it coupled with the word "*commit*;" the expression is, "*commit suicide*." The meaning of "*commit*," in *Johnson* (with reference to this use of the word) is, "to *perpetrate* — to do a fault — to be guilty of a crime;" and "*perpetrate*" is, to *commit*, to *act* — always in an *ill* sense. There is no material difference in *Richardson*. If, therefore, it be admitted, as I think it must, that one meaning of "*suicide*" imports not merely an act, but a *criminal* act, the use of the expression "*commit suicide*" is some, and I own I think a strong, reason for believing that the parties to this contract used the word in that sense.

The sentence also in which it is found, may throw some light on the matter. It is coupled with death by duelling or by the hands of justice: and the condition is not — if the party shall *die by suicide*, but, if he shall "*commit suicide*." I think this imports some deliberate criminal act, and not an act the result of insanity, which leaves him intelligence enough to know the means of death, but without any moral control over his actions.

Again, does the nature of the instrument itself supply any argument either way? The object of such a policy is, generally, to make provision for the family of the insurer; and he would naturally desire to include all risks. It is admitted that he is protected, not only against the common chances of death by disease, but

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against accident, or mere negligence of the grossest kind. He may even be the immediate cause of his own death by a deadly weapon, provided he be so insane as to be utterly unconscious of what he is doing. But, according to the argument for the defendants below, if he retains a glimmering of reason just enough to enable him to seek to produce death by competent means—it matters not whether he be lost to all moral sense, and for any *other* act or crime a complete madman ; — his policy is forfeited.

I own I cannot, from the nature of the contract, believe that this was what the parties intended. A man anxious to provide for his family, would, among the possible calamities of life that might terminate it, anticipate *madness* as one : and, whether it prostrated his intellect altogether, or produced delusion, or destroyed only a part of his faculties, would make no difference. The language used in the agreement between the parties, does not *necessarily* exclude this risk. I think, therefore, as against the office, the risk ought to be included.

Examining the question upon more general principles, I am induced to come to the same conclusion. In the eye of the law, with reference to crime, a man is either *compos mentis* and responsible, or he is *non compos mentis* and irresponsible. Physiologically, no doubt, it is otherwise : and the gradations are perhaps imperceptible, from the highest perfection of intellect, to the darkest obscuration of the mind. But, in point of law, as soon as it is ascertained that a person (to use the language of my brother *Cresswell* in directing the jury) has lost his sense of right and wrong, it matters not what else of the human faculties or capacities remain ; he ceases to be a responsible agent ; and, in my judgment, can no more *commit suicide* than he can commit murder.

Lastly, the views taken by the defendants' counsel



appear to me to be opposed to all the principles of sound philosophy which can be applied to the subject.

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It is admitted, of course, that the office would be liable, if death ensued from any of the ordinary casualties of life, even resulting from the act of the party insured; provided the act were not done with the intention to kill. The act of a raving madman, or of a patient under the influence of disease, is protected by the policy, if the consequences are not foreseen and intended. So, if insanity should produce delusion, and deprive a man of the use of the ordinary senses, and the party should mistake a deadly weapon for an instrument of music, and fancy he was playing upon it, when he was destroying his own life; this would not be *committing suicide* within the proviso of the policy. But, what if the delusion, instead of applying to a pistol, or other instrument of death, applied to the man himself? Suppose he believed he was *Marcus Curtius*, and ought to leap into a gulf? or that he was one of the *Decii*, and must sacrifice himself for the benefit of his country? or, what, if he fancied himself an apostle, and that it became his duty to die the death of a martyr? What sound philosophy is there in making a distinction between a delusion about a pistol, and a delusion in respect of the man against whom it may be directed? or, what distinction, in point of good sense, can be taken between physical blindness, in consequence of which the party insured walks into a well, and intellectual or moral blindness, which, leaving him the use of his senses, and a knowledge of the *physical* consequences of his acts, has deprived him of all judgment which should control and govern his acts, and of all sense to perceive their *moral* consequences?

It may be said, that, when the delusion extends to the character, office, or condition of the party,—so that he mistakes his identity,—he does not mean to kill *himself*, and in such a case the office would be liable.

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But, how far is this to be carried? Suppose, under delusion, he believed he had committed a crime for which he ought to put himself to death, and that this was the result of insanity — is this a mistake of his identity? and how is a judge to direct a jury so as to steer clear of the difficulties that would thus arise? In my opinion, such subtleties as these ought to find no place in the decision of such a question as the present, in which is involved (from the present extensive practice of life-insurance) the peace, the happiness, and security of thousands of families. Some simple, clear, and safe rule ought to be laid down as to a subject in which the public is so deeply interested.

In my judgment, if death be the result of *disease* — whether by affecting the *senses* or the *reason* — the insurance office is liable under this policy. Whether the privation of reason be total or partial, whether it produce delusion of one kind or another — whether it affects sensation, apprehension, memory, judgment, or will, or any of the moral and intellectual powers which constitute our nature — if the act be not the act of a sane responsible creature, but is the result of any delusion or perversion, whether physical, intellectual, or moral, it is not the act of *the man*: and, to hold otherwise, seems to me a departure from the simplicity of the law, and to be repugnant to sound philosophy, which is the spirit of all law, and on which all law ought to be founded.

I will only add, that I have not adverted to the case of *Borradaile v. Hunter*, because the expression in that case — “*shall die by his own hand*” (a) — is so different from the expression in this case — “*commit suicide*” — that that decision is no authority on the point arising here.

(a) *Vide antè*, 476 (a) *in fine*.



the opinion of the majority of the learned judges were present at the argument being in favour of the facts in error, a *venire de novo* was awarded. (a)

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Judgment accordingly. (b)

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The case proceeded no further; the office agreed to reimburse the premiums received, interest at 4 per cent., amounting to 967l. 9s. 7d., and their own costs. An order for the same effect had been made before action, but rejected. 'Suicide' appears to be introduced to supply the want of a legal term to denote the offence of *felo de se*. Legal and medical writers, when treating of suicide, have been almost

unavoidably led to consider the proximate act of excusable self-destruction, or *quasi-suicide*; and have done so without formally disclaiming the use of a term which, though in some sense *technical*, is not a word of art. The term, in addition to its primary and ordinary signification, has thus acquired the secondary meaning applied by the court to the construction of this policy.

## GREGORY v. The Duke of BRUNSWICK, and VALLANCE.

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THE declaration stated that the plaintiff, before and at the time of the making of the conspiracy, confederacy, combination, and agreement by which the plaintiff's being

employed as an actor, stated, by way of inducement, that the plaintiff was about to enter into the profession of an actor for emolument, and that he did become an actor, and exercised that profession; and then alleged the conspiracy of the defendants, and its results. The defendants pleaded, first, not guilty, then two pleas to the first and second counts, and a fourth, stating special matter, which was demurred to. The demurrer was determined by the court in favour of the plaintiff.

A declaration for a conspiracy to prevent the plaintiff's being employed as an actor, stated, by way of inducement, that the plaintiff was about to enter into the profession of an actor for emolument, and that he did become an actor, and exercised that profession; and then alleged the conspiracy of the defendants, and its results. The defendants pleaded, first, not guilty, then two pleas to the first and second counts, and a fourth, stating special matter, which was demurred to. The demurrer was determined by the court in favour of the plaintiff.

was awarded, to try the issues and to assess damages. The jury found facts in favour of the defendants, but assessed no damages in respect of the conspiracy. Judgment was given for the defendants, with costs of suit, but without an award of costs of the demurrer:—that, a verdict having been found for the defendants upon an issue that the whole cause of action on the merits, the want of an assessment of damages was not error; and, for the same reason, that a replender was unnecessary, (as *come semble*) the issues joined on the second and third pleas were immaterial. It was also, that the judgment was erroneous, in not awarding costs of the demurrer pursuant to the 3 & 4 W. 4. c. 42. s. 34.

It was held, that, upon this writ of error brought by the plaintiff, the court could not reverse the judgment of the court below, but must give such judgment as the court ought to have given, viz. a judgment for the plaintiff on the demurrer, and for the defendants on the issues found for them.



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the defendants thereafter mentioned, was about become an actor, and to use and exercise the profession or occupation of an actor, for the emolument, profit and advantage of the plaintiff, and to perform, as the plaintiff thereafter mentioned, in public, as such actor, in the character of *Hamlet*, in the performance of a certain tragedy in a certain theatre wherein such performance was duly authorised, as by law required, to wit, *Covent Garden Theatre*, in the county of *Middlesex*, at the request of one *Alfred Bunn*, for reward to be therefore paid to the plaintiff by the said *Alfred Bunn*, then manager of the said theatre: yet that the defendants, together with other persons whose names were unknown to the plaintiff, well knowing the premises but contriving, and falsely and maliciously intending to injure and aggrieve the plaintiff, and to bring him into public scandal, shame, and disgrace, and to injure the plaintiff in his said profession or occupation of an actor, and to prevent him from acquiring any fame, success or reputation, gain, or profit therein, and to oppress, vex, impoverish, and ruin the plaintiff, theretofore, and before the plaintiff appeared and performed in the said character of *Hamlet* as thereafter mentioned, to wit, on &c., falsely, wickedly, and maliciously did amongst themselves conspire, combine, confederate, and agree together, to prevent the plaintiff from performing in public as such actor as aforesaid in the character of *Hamlet*, in the performance of the said tragedy in the theatre aforesaid, and to prevent the public audience which might be assembled to witness the performance of the said tragedy in the said theatre, on the occasion when the plaintiff was to perform as aforesaid, from hearing or appreciating the performance of the said character by the plaintiff as aforesaid in the said tragedy, and to compel the plaintiff to desist from the performance of the said character, and to deter a



prevent the manager of the said theatre from allowing or retaining the plaintiff to perform, as such actor as aforesaid, in the said theatre, and to prevent the plaintiff from exercising his said profession or occupation of an actor in the said theatre, and from gaining or acquiring any profit, fame, or reputation by his performance as an actor in the character aforesaid: that the defendants, falsely and maliciously contriving and intending as aforesaid, afterwards, and before the plaintiff appeared and performed as thereafter mentioned, to wit, on &c., in pursuance of, and according to, the said conspiracy, combination, confederacy, and agreement had among themselves and the said other persons as aforesaid, and in order to carry the same into fulfilment, hired and engaged divers, to wit, 200 persons whose names were unknown to the plaintiff, for gain and reward to them in that behalf, and caused and procured divers, to wit, 200 other persons whose names were unknown to the plaintiff, to attend, and they did accordingly attend, as part of the audience, in the said theatre, on the occasion when the plaintiff was to perform as aforesaid, and did perform as thereafter mentioned, to hoot, hiss, groan, and yell at and against the plaintiff, and to make a great noise, outcry, uproar, and riot at and against the plaintiff during his performance of the said character on the occasion aforesaid, and to aid and assist the defendants and the said other unknown persons first above mentioned, in carrying into effect and fulfilment their unlawful and malicious conspiracy, combination, confederacy, and agreement aforesaid; that afterwards, and before and at the time of the committing of the grievances next thereafter mentioned, to wit, on &c., the plaintiff became such actor as aforesaid, and used and exercised the said profession or occupation of an actor, for his emolument and profit; and, at the said request of the said *Alfred Bunn*, and for

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reward to be paid by him to the plaintiff as afore-  
 did appear and perform as such actor as aforesaid in  
 said character of *Hamlet*, in the performance of the  
 tragedy in the said theatre, before a certain p  
 audience then assembled therein: and that the  
 defendants, well knowing the premises, but falsely  
 maliciously contriving and intending as aforesaid,  
 the plaintiff had become such actor as aforesaid,  
 while the plaintiff was so in the act of appearing  
 performing as such actor as aforesaid, in the char  
 aforesaid, in the performance of the said tragedy, in  
 said theatre, before the said public audience, and  
 continually during all the time while the plaintiff wa  
 appearing and performing as aforesaid, to wit, on  
 in pursuance of and according to the said mali  
 and unlawful conspiracy, combination, confederacy  
 agreement so had and made as aforesaid, and in  
 to carry the same into fulfilment, did, together  
 divers others of the said persons unknown, first  
 mentioned, and divers of the said persons so hired  
 engaged, and caused and procured by the defendan  
 attend for the purpose in that behalf above mentio  
 then and there in the said theatre, and in the  
 sence and hearing of the plaintiff and of the said p  
 audience, hoot, hiss, groan, shout, and yell at the p  
 tiff, and make a great, hideous, and intolerable n  
 outcry, uproar, and riot at and against the plaintiff,  
 persuade, instigate, cause, and procure, lead, and in  
 divers and very many other persons then and  
 present in the said theatre also to join in, and wh  
 by reason thereof then join the defendants in, ther  
 there hooting, hissing, groaning, shouting, and y  
 at the plaintiff, and in making such noise, outcry  
 roar, and riot at and against the plaintiff as afo  
 during the plaintiff's said performance in the  
 theatre, and in the presence and hearing of the pl



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and of the said public audience; insomuch that the plaintiff's said performance of the said character of *Hamlet*, on the occasion aforesaid, could not, by reason of the committing of the said grievances by the defendants as aforesaid be heard, understood, or appreciated by the said public audience then and there assembled in the said theatre as aforesaid, and insomuch that the plaintiff was, by, through, and in consequence thereof, then compelled to and did desist from and discontinue the performance of the said character of *Hamlet* on the occasion aforesaid, before the plaintiff had finished or completed the performance thereof. The declaration then assigned for special damage, that the said *Alfred Bunn* was by reason of the premises induced and obliged to refuse, and did refuse, to retain or allow the plaintiff to perform at subsequent times as an actor in the said theatre for gain and reward to the plaintiff, as the said *Alfred Bunn* otherwise might and would have done; and that also, by reason of the premises, the plaintiff had been brought into public shame and disgrace, and had been hindered and prevented from acquiring any applause, approbation, fame, or reputation as an actor, and had been and was hindered and prevented from exercising his said profession or occupation of an actor, and from obtaining any engagement or employment therein, and had thereby lost and been prevented from acquiring all the gains and profits that he might and otherwise would have made and derived from being retained and allowed by the said *Alfred Bunn* to perform as such actor as aforesaid in the said theatre, and from the exercise of his said profession or occupation of an actor, amounting to a large sum of money, to wit, 3000*£*, and had been and was otherwise injured and damnified, &c.

The defendants pleaded — first, not guilty — secondly, a denial that the plaintiff was about to become an actor,



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and to use and exercise the profession or occupation of an actor, for profit, as in the declaration alleged — thirdly, a denial that the plaintiff had become such actor, for profit, as alleged — fourthly, as to so much of the grievances in the declaration alleged as related to the hooting, hissing, groaning, shouting, and yelling at the plaintiff, and making a noise, outcry, and uproar at and against him, a plea alleging a variety of circumstances tending to shew that the plaintiff, by reason of the infamy of his character, was an unfit and improper person to appear before the public as an actor.

Issues were joined on the first three pleas; and to the fourth there was a demurrer, upon which the plaintiff in *Trinity* term, 1843, obtained judgment. (a)

A *venire facias* was awarded, to try the issues in fact, and also to assess damages on the judgment on demurrer. At the trial the jury found the three issues for the defendants; and there was no assessment of damages on the judgment on demurrer, nor was any judgment for the plaintiff thereon entered upon the record. The judgment for the defendants was entered as follows: —

“ Afterwards, that is to say, on the day and year and at the place within mentioned, before, &c., come the within-named plaintiff and defendants by their respective attorneys within named; and the jurors of the jury within mentioned, being impannelled, &c., as to the first issue within joined between the said parties, say, upon their oath, that they the defendants are not guilty of the within-mentioned several grievances within laid to their charge, in manner and form as in the within declaration alleged; and, as to the second issue within joined between the said parties, the jurors aforesaid, upon their oath aforesaid, say that the within-named *Barnard Gregory* was not about to use or exercise the profession or

(a) See 6 *M. & G.* 205., 6 *Scott, N. R.* 809.



occupation of an actor for the emolument or advantage of him the said *Barnard Gregory*, in manner and form as in that behalf is alleged; and, as to the third issue within joined between the said parties, the jurors aforesaid, upon their oath aforesaid, say, that the said *Barnard Gregory* did not become such actor, and use or exercise the within-mentioned profession of an actor for his emolument and profit, nor appeared and performed as such actor for reward to be paid by the within-named *Alfred Bunn* to him the said *Barnard Gregory*, in manner and form as in that behalf is alleged."

Upon this judgment the plaintiff brought a writ of error; assigning for errors — that the pleas aforesaid, and the matters therein contained, were not, nor was either of them, sufficient in law to bar the said *Barnard Gregory* from having and maintaining his said action against the defendants — that the jury omitted to assess damages for the said *Barnard Gregory* on the demurrer on which judgment was given in his favour, pursuant to the *venire facias* — that the issues joined on the second and third pleas were immaterial, and the court below ought to have awarded a repleader thereon — that judgment ought to have been given for the said *Barnard Gregory* to recover his costs and charges upon and in respect of the said judgment given in his favour on the demurrer to the last plea, or that the said costs and charges should be deducted from the costs and charges which had been awarded to the defendants on the final judgment given to them as aforesaid — that, by the record aforesaid, it appeared that the final judgment aforesaid in form aforesaid given, was given for the defendants against the said *Barnard Gregory*, whereas, by the law of the land, the said judgment ought to have been given for the said *Barnard Gregory* against the defendants — "And the said *Barnard Gregory* prays that the judgment aforesaid, for the errors aforesaid,

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and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment," &c.  
Joinder in error.

*W. H. Watson*, for the plaintiff in error. (a) The second and third pleas, — which are pleaded to mere matters of inducement, — tender issues that are altogether immaterial, and therefore the court below should have awarded a repleader. Then, the *venire* required the jury to assess damages on the judgment on demurrer to the fourth plea. They have not done so; and therefore the judgment is clearly erroneous. There should have been an assessment of nominal damages, and an award of costs to the plaintiff, on the issue in law. [*Parke, B.* How could the jury assess damages for the plaintiff on the issue in law, when they found for the defendants not guilty? The only question is whether there should not have been a judgment for the plaintiff's costs on that issue.] In *Duberley v. Page* (b), it was held, that, if one of several pleas pleaded by a defendant be adjudged bad on a demurrer to the plaintiff's replication, the plaintiff is entitled to have the costs of those pleadings deducted from the costs taxed for the defendant upon the *postea*, if afterwards, upon the trial of the issues joined on the other pleas, the defendant should have a verdict; even though it should appear, on the whole of the record, that the plaintiff had no cause of action. By the 8 & 9 *W. 3. c. 11. s. 2.* it was enacted, that, "if any person shall commence or prosecute any action in any court of record, wherein, upon demurrer, either by plaintiff or defendant, demandant or tenant,

(a) The case was argued on the 15th of June, 1844, before *Pollock, C.B., Parke, B., Alder-*

*son, B., Patteson, J., Col-  
ridge, J., and Wightman, J.*  
(b) 2 *T. R.* 391.



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judgment shall be given by the court against the plaintiff or demandant, the defendant or tenant shall have judgment to recover his costs, and have execution for the same by *ca. sa.*, *fi. fa.*, or *elegit.*" This provision did not extend to demurrers to pleas in abatement (a); nor to any action wherein the defendant would not have been entitled to costs upon a nonsuit or verdict (b); nor to a demurrer by one or more of several defendants. (c) But now, by the 3 & 4 W. 4. c. 42. s. 34., it is enacted, that, "where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined in any action whatever, the party in whose favour such judgment shall be given, shall also have judgment to recover his costs in that behalf." The statute is imperative. [Pollock, C. B. The object of the 3 & 4 W. 4. c. 42. s. 34. was, to extend the former statute to cases to which it had been held not to apply. The 8 & 9 W. 3. c. 11. s. 2. applied only to judgments on the whole record: double pleading did not then exist. The words of the two statutes being the same, must they not receive the same construction in this respect?] With full knowledge of the altered state of the law in respect of pleading, the legislature, in the 3 & 4 W. 4., acts, that, where a plaintiff or defendant obtains judgment on any demurrer joined in any action whatever, shall have judgment for his costs. [Wightman, J. would you give a judgment for the plaintiff here?] giving a judgment and an award of execution both plaintiff and defendant. In *Price v. Seeley* (a), the

*Michlam v. Bate*, 8 B.  
12., 3 M. & R. 91.

*Miller v. Seagrave*, Cas.  
P. 25.; *Thrale v. The*  
*of London*, 1 H. Blac.  
but see *Anon. Cas. Pr.*  
*contra.*

(c) *Forbes v. Gregory* (or  
*King*), 1 C. & M. 435., 3 Tyrwh.  
385., 1 Dowl. P. C. 679.

(d) 10 Law. Journ. N. S.,  
*Exch.* 543., 10 Clark & Fin-  
nelly, 28.



1846. judgment was so entered, and no objection was taken,  
 — either here or in the House of Lords.

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 The Duke of Talfourd, Serjt., *contra*. Assuming that the issues  
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(a) 7 M. & G. 850., 8 Scott, N. R. 604.



of the lord chief justice at the trial : but they reversed the judgment of the Common Pleas so far as related to the demurrer to the sixth plea. The House of Lords held that the plaintiff below was not entitled to *the costs in error* ; and therefore they reversed the judgment of this court *pro tanto*, giving such judgment as this court ought to have given. So, here, this court cannot reverse the judgment altogether, even if they should come to the conclusion that the plaintiff should have had a judgment for the costs of the demurrer ; but they will give such judgment upon the whole record as the court below ought to have given.

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*Cur. adv. vult.*

PARKE, B., now delivered the judgment of the court : —

This case was argued some time ago, before this court, and stood over for consideration. We think that the record is erroneous, but that the plaintiff in error ought not to succeed in entirely reversing the judgment.

The action was brought in the Common Pleas by the plaintiff, for a conspiracy to ruin the reputation of the plaintiff, and prevent him being employed as an actor. The declaration contained a statement, by way of inducement, that the plaintiff was about to use and exercise the profession or occupation of an actor, for emolument ; and also that he did become an actor, and used and exercised that profession ; and stated the conspiracy of the defendants, and its result. The defendants pleaded — first, not guilty ; then, two pleas denying these matters of inducement ; and a fourth, stating special matter, which was demurred to ; and the demurrer was determined by the court in favour of the plaintiff. (a) The *venire* was in the proper form, to try

(a) *Vide* 6 M. & G. 205., 6 Scott, N. R. 809.



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 ——— three issues for the defendants, and did not assess any  
 GREGORY damages for the plaintiff; and the judgment of the  
 v. court was given for the defendants, with costs; but no  
 The Duke of judgment was entered on the record for the plaintiff on  
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On the writ of error, several errors were assigned: one, that the two issues on the matters of inducement were immaterial, and that there ought to have been a repleader, in consequence. It may be that these issues were immaterial; and we are inclined to think that they were; because, whether the plaintiff was about to be an actor, or was an actor, or not, at the time of the conspiracy, still the conspiracy to prevent him by illegal means from becoming one, and by means thereof actually preventing him from subsequently entering into that profession, would be actionable. But, supposing these issues to be immaterial, and a verdict upon them, if they had stood alone, would not have decided the question between the parties, and there would have been a necessity in that case for a repleader; yet, as there is another unobjectionable plea on the record, which does decide the case on the merits, a repleader is clearly unnecessary. The case of *Plummer v. Lee* (a) must be considered as no longer law, after the observations made on this subject, in the judgments in the House of Lords, in *Gwynne v. Burnell*. (b) And see the case of *Negelen v. Mitchell*. (c)

Another error assigned, was, that the jury did not, as required by the *venire*, assess damages on the demurrer. The form of the *venire* was, no doubt, proper, as explained in the case of *Codrington v. Lloyd* (d); but, when the jury found the issue on not guilty for the defendant,

(a) 2 M. & W. 495., 5 Dowl. P. C. 755.

(b) 6 N. C. 453., 2 Scott, N. R. 711., 2 Clark & Finnelly, 572.

(c) 7 M. & W. 612., 1 Dowl. N. S. 110.

(d) 8 Ad. & E. 449., 3 N. & P. 442.



— about the sufficiency of which plea there could be no doubt,— it became immaterial to assess the damages.

We agree in the view taken of this point by the court of Common Pleas in this case, as reported in 1 *D. & L.* 806. (a)

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The remaining ground assigned for error is attended with more difficulty. It is, that there is no judgment entered on the demurrer to the fourth plea, decided for the plaintiff. By the 4 & 5 *Ann. c. 16. s. 5.*, if a demurrer is joined on a plea, and the matter is judged insufficient, costs are to be given at the discretion of the court: and it has been held that these terms relate to the *quantum* only; for the plaintiff is entitled to some costs, by virtue of the statute; and the proper and formal mode of giving costs is, no doubt, that there should be a judgment for them; and the plaintiff's claim for a judgment and costs on the demurrer might be rested on the statute of *Anne*, and would have been well founded, if no subsequent act had passed. But the 3 & 4 *W. 4. c. 42. s. 34.* provides, that, where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon *any* demurrer joined in *any* action whatever, the party in whose favour such judgment shall be given, shall also have judgment to recover his costs in that behalf: and, though the object of the statute was, to provide for cases not included in the 8 & 9 *W. 3. c. 11. s. 2.*, which had been construed not to extend to any cases except where the plaintiff would have recovered his costs if he had recovered, its terms are so general that there seems to be no question, but that it gives a right to a judgment and costs in all cases of demurrer. (b) It is impossible for us to take notice that the plaintiff has had those costs allowed by way of deduction out of the general costs

(a) Also reported 6 *M. & G.* 953. 958., 7 *Scott, N. R.* 972. (b) *Gilb. Hist. of C. P.*, p. 271.



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given to the defendant, for, there is no averment on the record to warrant that assumption.

As a judgment, therefore, ought to have been given for the plaintiff on demurrer, giving him costs, the only remaining question is, what is the consequence of its omission.

The authorities shew that a judgment would be bad, on a writ of error by a defendant, where part was found against the defendant and part for him, and a judgment given against the defendant for the former part only, and none in his favour for the latter. In *Wood v. Suckling* (or *Sutcliffe*), (a) in trover, on not guilty, part was found for the plaintiff, and part for the defendant, but no judgment of *eat sine die* for the defendant on the part found for him: the defendant brought a writ of error; and the judgment was for that reason (and another) reversed. (b) And so, in the case of *Gregory v. Eedes* (c), in an action on three promises, verdict for the plaintiff on two, and for the defendant on the third; judgment for the plaintiff on the two was reversed, because there was no judgment of *eat sine die* on the third. In the report it is said it was reversed *nisi*; but the record has been searched and it is found to have been reversed absolutely. (d) In *O'Connell's* case, however, the judges held the same rule not to apply, after a careful inquiry into the practice, and search into the precedents at the Crown Office. But we saw no reason to think, that, in civil cases, the record would not be defective on this ground.

We must, therefore, consider this judgment as erroneous, as there has been a failure of justice, in the court not giving judgment for the plaintiff for the costs to which he was entitled. But, is the judgment to be therefore

(a) *Cro. Jac.* 439., 1 *Roll. Rep.* 293.

(b) 9 *Vin. Abr. Error*, (B. b.), nl. 18.

(c) 2 *Keb.* 506. 535.

(d) The rule *nisi* would not appear on the record.



simply reversed? or is this court to give judgment on the whole record, such as the whole record warrants?

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The distinction pointed out in the books is this — that, if judgment be given for the plaintiff, and the defendant bring a writ of error, upon which the judgment is reversed, the judgment shall only be to reverse the former judgment; for, the writ of error is brought only to be eased and discharged of the former judgment: but, if judgment be given for the defendant, and the plaintiff brings a writ of error, the judgment shall not only be reversed, but the court shall also give such judgment as the court below should have given; for, the writ of error is, to revive the first cause of action, and to recover what ought to be recovered by the first action: *Parker v. Harris.* (a)

It is not easy to reconcile this distinction with the form of a writ of error; which, whether brought by the defendant or the plaintiff, is the same, and directs the court of error to revise and examine the record, and to do thereupon what of right ought to be done; and the distinction seems to be disregarded in another case in *Salkeld* (b), noticed by *Bayley, J.*, in *Gildart v. Gladstone* (c): and, since the latter case, the distinction would probably have no longer existed, had it not been for the *dicta* in *The King v. Bourne* (d), and the true rule would have been held to be, in all cases, that the court of error should give the same judgment as the court below ought to have given. But, then, upon that supposition, it would be impossible to support many cases, in which judgments have been reversed, in writs of error by defendants, where a *capiatur pro fine*, or an *in misericordia*, has been improperly awarded; for, if the court of error could give the same judgment as the

(a) 1 *Salk.* 262.(c) 12 *East*, 668.(b) *Anon.* 1 *Salk.* 401. And  
see *Phillips v. Berry*, *ib.* 403.(d) 7 *Ad. & E.* 58., 2 *N. & P.* 248.



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court below, it would not have to reverse merely, but cure the defect, by entering the judgment in proper form.

Be this as it may, the present is the case of a writ of error *by the plaintiff* below, who complains that the record is erroneous, and asks to have it reversed, and justice done to himself. If judgment is reversed simply, complete justice is not done. To do that, the plaintiff must have a judgment in his favour on the demurrer; for, the costs may greatly exceed the defendants' costs of the cause. But the court could not give that judgment, without also giving a complete judgment on every part of the record. And the result must be, that the new judgment will not only be for the plaintiff for the costs on the demurrer, but for the defendants on the issues (a) found for them.

Judgment accordingly.

(a) Quære, as to the form of the judgment in respect of the second and third issues.

June 16.

M'ALPINE v. MANGNALL and Another.

A patent is not avoided by an assignment to trustees for the benefit of the creditors of the patentee, exceeding twelve in number.

When exceptions are taken to the direction of a judge, it is

not enough to state in the bill of exceptions that he declined to direct the jury in the way suggested, without shewing what his direction was.

CASE, for the infringement of a patent. The declaration set forth a grant of letters-patent to *Thomas Ridgway Bridson* and *William Latham*, for "Improvements in machinery or apparatus for stretching, drying, and finishing woven fabrics," bearing date the 26th of *May*, 1838—the enrolment of a specification on the 23rd of *November*, 1838—an assignment [release] by *Latham*, on the 13th of *March*, 1839, of all his interest in the patent to *Bridson*, his executors, administrators, and assigns—and an assignment, on the 21st of *April*, 1840, by *Bridson* to the plaintiffs below, and one *Benjamin Hick*, since de-



ceased, their executors, administrators, and assigns — and then alleged that the defendant below did, after the making of the letters-patent, and after the making of the said several indentures, and after the death of *Hick*, and within the term in the letters-patent mentioned, to wit, in &c., within *England*, wrongfully and unjustly, without the leave or licence of *Bridson* and *Latham* by the defendant had or obtained before the making of the first-mentioned indenture, and without the leave or licence of *Bridson* by the defendant below had or obtained before the making of the indenture secondly above mentioned, and without the leave or licence of the plaintiffs below and *Hick*, by the defendant below had and obtained after the making of the last-mentioned indenture, and in the lifetime of *Hick*, and without the leave or licence of the plaintiffs, and without any leave or licence whatsoever, in writing or otherwise, under hand and seal, or hands and seals, or otherwise, and against the will of the plaintiffs, use and put in practice the said invention and divers parts thereof, to wit, each and every part of the same, in breach of the said letters-patent, &c.; and did counterfeit, imitate, and resemble the said invention, in breach, &c.; and also did make and cause to be made divers additions to and subtractions from the said invention, whereby to pretend himself, the defendant below, the inventor and devisor of the said invention, and did then pretend himself to be the inventor and devisor of the said invention, in breach, &c.

The defendant below craved oyer of the indenture of the 21st of *April*, 1840. The parties thereto were, *Bridson*, therein described as of *Bolton-le-Moors*, in the county of *Lancaster*, bleacher, of the first part, and the plaintiffs below and *Hick* of the second part; and, after reciting, that, by indenture bearing date the 1st of *May*, 1835, made between *Bridson* of the first part, the plaintiffs below and *Hick* of the second part, the several

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persons whose names were mentioned in the second schedule thereunder written or thereunto annexed, and whose names were thereunto subscribed or seals affixed of the third part, and the several persons whose names were mentioned in the schedule thirdly thereunder written or thereunto annexed, and whose names were thereunto subscribed or seals affixed, of the fourth part for the considerations therein mentioned, *Bridson* did grant, bargain, sell, assign, transfer, and set over unto the said parties thereto of the second part, their executors, &c., all and singular the leasehold messuages, works, warehouses, buildings, lands, and premises, and all and singular the stock in trade, machinery, &c., and of him *Bridson*, and of, in, or to which he, or any person or persons in trust for him, had any estate or interest, claim or demand, in possession, reversion, remainder, expectancy, or otherwise howsoever, with their appurtenances; to hold the said leasehold premises, with their appurtenances, unto the said persons parties thereto of the second part, their executors, &c., thenceforth during the residue then unexpired of the term or terms of years for which the same leasehold premises were held, subject to such rents, mortgages, charges, and other incumbrances as affected the same; and to hold, receive, and take all and singular other the premises thereinbefore assigned, with the appurtenances, unto the said persons parties thereto of the second part, their executors, &c., subject to such mortgages, charges, and other incumbrances (if any) as the same premises were subject to; upon the trusts, and with, under, and subject to the powers, provisoes, agreements, and declarations therein expressed or declared of or concerning the same, for carrying on the business of *Bridson* for the benefit of his creditors: and further reciting the grant of the letters-patent to *Bridson* and *Latham*, and the assignment [release] of *Latham's* share therein to *Bridson*:



and further reciting that the costs of obtaining the said letters-patent, and the money paid to *Latham* for the purchase of his share and interest therein, were paid and discharged out of the moneys belonging to the plaintiffs below and *Hick* as such trustees as aforesaid; and that, in consideration thereof, *Bridson* had agreed to assign to them the said letters-patent, upon the trusts and in manner hereinafter mentioned: it was witnessed, that, in pursuance and performance of the said agreement, and in consideration of the premises, and of 10s. by the plaintiffs below and *Hick* to *Bridson* paid immediately before the execution of those presents, he, *Bridson*, did, by those presents, grant, bargain, sell, assign, transfer, and set over unto the plaintiffs below and *Hick*, their executors, &c., all the said recited letters-patent, and the exclusive right and enjoyment of the invention therein mentioned and thereby granted to *Bridson* and *Latham*, their executors, administrators, and assigns, as aforesaid, and all and singular the rights, &c., granted by the same letters-patent, and from time to time to accrue or arise therefrom, or by reason of the said invention in respect of which the same letters-patent were granted, and all the estate, &c., of him *Bridson*, of, in, to, or out of the said letters-patent and the said invention respectively,—to have and to hold the said letters-patent, and receive and enjoy all profit, benefit, and advantage to arise therefrom or by reason of the said invention, and all other the premises thereinbefore mentioned to be thereby assigned, with the appurtenances, unto the plaintiffs below and *Hick*, their executors, administrators, and assigns, thenceforth, during all the residue yet to come and unexpired of the said term of fourteen years therein, as and for their and his own proper effects, upon the trusts following, that is to say, upon trust that they the plaintiffs below and *Hick*, and the survivors and survivor of them, his executors and

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persons whose names were mentioned in the second schedule thereunder written or thereunto annexed, and whose names were thereunto subscribed or seals affixed of the third part, and the several persons whose names were mentioned in the schedule thirdly thereunder written or thereunto annexed, and whose names were thereunto subscribed or seals affixed, of the fourth part for the considerations therein mentioned, *Bridson* grant, bargain, sell, assign, transfer, and set over unto the said parties thereto of the second part, their executors, &c., all and singular the leasehold messuages, works, warehouses, buildings, lands, and premises, and all and singular the stock in trade, machinery, &c., and of him *Bridson*, and of, in, or to which he, or a person or persons in trust for him, had any estate, interest, claim or demand, in possession, reversion, remainder, expectancy, or otherwise howsoever, with the appurtenances; to hold the said leasehold premises with their appurtenances, unto the said persons parties thereto of the second part, their executors, &c., thenceforth during the residue then unexpired of the term or terms of years for which the same leasehold premises were held, subject to such rents, mortgages, charges and other incumbrances as affected the same; and to hold, receive, and take all and singular other the premises thereinbefore assigned, with the appurtenance unto the said persons parties thereto of the second part, their executors, &c., subject to such mortgages, charges and other incumbrances (if any) as the same premises were subject to; upon the trusts, and with, under, and subject to the powers, provisoes, agreements, and declarations therein expressed or declared of or concerning the same, for carrying on the business of *Bridson* for the benefit of his creditors: and further reciting the grant of the letters-patent to *Bridson* and *Latham*, and the assignment [release] of *Latham's* share therein to *Bridson*



the 1st of *May*, 1835, to give good and effectual receipts and discharges for any money to arise from any such sale, or the granting of any such licences as aforesaid, or for any moneys payable to them or him under or by virtue of those presents, or in the execution of any of the trusts or powers therein contained, &c. The indenture also contained covenants by *Bridson*, that he had done no act to incumber or prejudicially affect the letters-patent, for quiet enjoyment, and for further assurance.

The defendant below then pleaded—first, not guilty—secondly, that *Bridson* and *Latham* were not the true and first inventors of the said improvements in machinery or apparatus for stretching, drying, and finishing woven fabrics—thirdly, that *Bridson* and *Latham* did not by the said instrument in the declaration mentioned, particularly describe and ascertain the nature of the invention, and in what manner the same might be performed—fourthly, that the invention was not new—fifthly, that a certain part of the invention in and by the said instrument in writing in the declaration mentioned, particularly described and ascertained, the same being a material part of the invention in respect of which the letters-patent were granted, was not, nor is, the working or making of any manner of new manufacture for which letters-patent could be granted, according to the true intent and meaning of the statute in that behalf made and provided—sixthly, that the invention described in the specification was not the invention for which the letters-patent were granted—seventhly, that a part of the invention was not an improvement in machinery or apparatus for stretching, drying, and finishing woven fabrics.

Eighthly, that, in the said letters-patent, there was and is contained a proviso, and that the said letters-patent were upon the express condition, that, if, at any time after the making of the said letters-patent, the said

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administrators, or the trustees or trustee for the time being under the said indenture of the 1st of *May*, 1835 should and did, from time to time, when and as they or he should think proper, absolutely sell, dispose of, and convey the said letters-patent and patent-right and invention, or otherwise grant licences for the use of the said letters-patent and patent-right or invention, to any person or persons, for and during all or any part of the residue then unexpired of the said term of fourteen years, for such price or prices in money, and upon such terms and conditions as they, the plaintiffs below and *Hick*, and the survivors and survivor of them, and their executors or administrators, or the said trustees or trustee for the time being, should, in their or his discretion, think proper; and, subject and without prejudice to the power of sale and granting licences therein before contained, did and should stand possessed of the said letters-patent, invention, rights, privileges, and premises thereby assigned, or intended so to be, and also of the moneys to arise from such sale, or the granting of any such licences as aforesaid, upon such and the like trusts, and to and for such and the like intents and purposes, and with, under, and subject to such and the like powers, provisoes, agreements, and declarations as were expressed, declared, and contained in the said thereinbefore in part recited indenture of the 1st of *May*, 1835, with respect to the estate of the said *T. R. Bridson* thereby assigned, or such of them as were then subsisting and capable of taking effect, in as full, ample and beneficial a manner to all intents and purposes whatsoever as if the same respectively had been therein repeated and expressed; provided, and it was thereby declared and agreed that it should be lawful for the plaintiffs below and *Hick*, and the survivors and survivor of them, his executors, &c., or the trustees or trustee for the time being under the said indenture of



1st of *May*, 1835, with respect to the estate and effects of *Bridson*, by the said indenture of the 1st of *May*, 1835, assigned, or intended so to be, as were at the date and the time of the making of the said indenture of the 21st of *April*, 1840, subsisting, and capable of taking effect, were trusts whereby, and that the said indenture of assignment of the 21st of *April*, 1840, was an indenture whereby, the said letters-patent in the declaration mentioned, and the liberties and privileges thereby granted, became and were vested in the plaintiffs below and *Hick*, in trust for more than the number of twelve persons, or their representatives, at one and the same time, as partners, dividing or entitled to divide the benefits or profits obtained by reason of the said letters-patent, reckoning executors and administrators as and for the single person whom they might represent, as to such interest as they might be entitled to in right of such their testator or intestate; whereby, and by reason whereof, the said letters-patent, and all liberties and advantages whatsoever thereby granted, did then utterly cease and determine, and became and were, and continued, utterly void and of no effect.

The ninth plea was the same as the eighth, as far as the asterisk, p. 502: it then averred that the moneys belonging to the plaintiffs below and *Hick*, as such trustees as in the indenture of the 21st of *April*, 1840, mentioned, were moneys belonging to the plaintiffs below and *Hick*, and whereof they were possessed, in trust for a great number of persons, to wit, a greater number than twelve persons, reckoning executors and administrators as and for the single persons whom they might represent; that the said letters-patent were granted to *Bridson* and *Latham* for the benefit of, and in trust for, the said last-mentioned persons, being in number more than the number of twelve persons, or their representatives, at one time, as partners, entitled

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letters-patent, or the liberties and privileges thereby granted, should become vested in, or in trust for, more than the number of twelve persons, or their representatives, at any one time, as partners, dividing, or entitled to divide, the benefits or profits obtained by reason of the said letters-patent (reckoning executors and administrators as and for the single person whom they represent, as to such interest as they should be entitled to in said letters-patent, and all liberties and privileges whatsoever thereby granted, should utterly cease, determine, and become void, any thing in the said letters-patent before contained to the contrary thereof in any way notwithstanding; that the indenture of the 1st of May, 1835, in the said indenture of the 21st of April, 1840, mentioned, was an indenture made between the several persons as in the said indenture of the 21st of April, 1840, mentioned; that the several persons whose names were contained in the said second and third schedules to the indenture of the 1st of May, 1835, thereunder written or thereto annexed, as in the indenture of the 21st of April, 1840, mentioned, and who became parties to and executed the said indenture of the 1st of May, 1835, were a great number of persons, to wit, a greater number than twelve persons, reckoning executors and administrators as and for the single person whom they might represent\*; that the trusts in the said indenture of the 21st of April, 1840, referred to as being the trusts upon which the plaintiffs below and Hick were declared stand possessed of the said letters-patent, inventions, rights, privileges, and premises thereby assigned, intended so to be, and also of the moneys to arise by such sale, or the granting of any such licence, as said indenture of the 21st of April, 1840, mentions being such of the like trusts as were expressed, declared, and contained in the said in part recited indentures.



1st of *May*, 1835, with respect to the estate and effects of *Bridson*, by the said indenture of the 1st of *May*, 1835, assigned, or intended so to be, as were at the date and the time of the making of the said indenture of the 21st of *April*, 1840, subsisting, and capable of taking effect, were trusts whereby, and that the said indenture of assignment of the 21st of *April*, 1840, was an indenture whereby, the said letters-patent in the declaration mentioned, and the liberties and privileges thereby granted, became and were vested in the plaintiffs below and *Hick*, in trust for more than the number of twelve persons, or their representatives, at one and the same time, as partners, dividing or entitled to divide the benefits or profits obtained by reason of the said letters-patent, reckoning executors and administrators as and for the single person whom they might represent, as to such interest as they might be entitled to in right of such their testator or intestate; whereby, and by reason whereof, the said letters-patent, and all liberties and advantages whatsoever thereby granted, did then utterly cease and determine, and became and were, and continued, utterly void and of no effect.

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The ninth plea was the same as the eighth, as far as the asterisk, p. 502: it then averred that the moneys belonging to the plaintiffs below and *Hick*, as such trustees as in the indenture of the 21st of *April*, 1840, mentioned, were moneys belonging to the plaintiffs below and *Hick*, and whereof they were possessed, in trust for a great number of persons, to wit, a greater number than twelve persons, reckoning executors and administrators as and for the single persons whom they might represent; that the said letters-patent were granted to *Bridson* and *Latham* for the benefit of, and in trust for, the said last-mentioned persons, being in number more than the number of twelve persons, or their representatives, at one time, as partners, entitled

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to divide the benefits and profits obtained by reason of the said letters-patent, reckoning executors and administrators as and for the single person whom they might represent, as to such interest as they might be entitled to in right of such their testator or intestate; whereby, &c., concluding as in the eighth plea.

The plaintiffs below joined issue on the first three pleas, and traversed the rest; upon which issues were joined.

The cause was tried before *Tindal*, C. J., at the sittings in *London* after last *Hilary* term. The letters patent and specification were put in. The material parts of the latter were as follows: —

“ These improvements in machinery or apparatus for stretching, drying, and finishing woven fabrics, consist in a novel arrangement of mechanism designed for the purpose of effecting these objects in a superior and more complete manner, by mechanical means, than has heretofore been accomplished, and with peculiar advantage, owing to the extreme elasticity of finish which is by such means imparted to the goods.

“ In order that these improvements may be properly understood, and more definitely explained, there is attached to these presents a drawing of the apparatus constructed, necessary for the purpose of stretching, drying, and finishing fine piece goods, such as plain, or checked, or figured muslins, lace, lenoes, and other similar light fabrics.

“ Figure 1. is a horizontal or top view of the machine, in which a piece of muslin is represented distended upon tension pins; in which situation the goods may be supposed to be under the improved operation. Figure 2. is a longitudinal or side elevation; and figure 3. is an end view of the same. Two longitudinal rails, or frames, *a. a.*, extend along the whole length of the piece of goods, and carry at their extreme ends, by means



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brackets, the pulleys *b. b.*, upon peripheries of which are placed small pins or studs, *c. c.*, at equal distances from each other; and these pins, *c. c.*, take into corresponding holes pierced in endless straps or bands, *d. d.* Upon the outer surface of the straps, near their inner edges, are fixed very fine needle or tenter-points, *e. e.*, for the purpose of holding the selvages of the fabric distended as it passes through the apparatus. The longitudinal bars or frames, *a. a.*, are attached to several transverse framings, *f. f. f.*, which carry the rack-bars *g.* and chains *h. h.* *These racks are well understood to be for the ordinary purpose of distending or stretching the cloth breadthwise in its wet state.* Immediately after it has been introduced, the framings *f. f.*, upon which the whole of the improved apparatus is carried, are supported upon central bearings *i. i.*, and allowed to turn or swivel upon the centre pins *j. j.* These framings are to be placed at any convenient distance apart, throughout the entire length of the machine, which is supposed to be of the same length as the piece of goods, although each end of the same is only shewn in the drawings for the sake of convenience.

“Now, supposing boys to be holding the end of a piece of muslin or other fabric at each selvage or side, and standing at that end of the machine shewn at the right hand of the figures 1. and 2., they first place the extreme ends of the piece upon the rails or stretchers *o. o.*, in order to keep the end of the cloth square and firm; and, after guiding each selvage on to the fine points or needles *e. e.* of the endless straps, the pressing-rollers *é. é.*, which are covered with felt or flannel, cause the needles *e. e.* to enter the selvages, and to hold the length of the muslin or other goods securely. The attendant then throws the toothed pinions *k. k.* upon the driving-shaft *l. l.* into gear with the spur-wheels *m. m.*, which wheels are fixed upon the same studs or shafts that carry the



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pulleys *b. b.*; and, as the pinions *k. k.* slide upon feath or keys formed upon the driving-shaft *l.*, they are thro in and out of gear by any suitable clutch-box attach to the driving-wheels which give motion from the m shafting. These pulleys *b. b.*, as they revolve, ca the straps to travel, and carry the muslin or other goe entirely over the machine, and extend it from end end, as represented in figure 1. The pinions *k. k.* a then to be thrown out of gear with the spur-wheels *m. m* and consequently this operation of the mechanism cease The muslin or other material being now stationary, i the wet state, just as it had come from the squeezers, c other wet process, and held in a slight state of tensio in the machine, the winch handle *n.* is to be turne This winch is keyed fast upon the stud that carries th pinion *p.* in gear with the wheel *q.* fixed upon the en of the central shaft *r. r.*, and, by means of small rack pinions, drives the racks *g.*, and, through the agency of the chains *h. h.*, causes the rails *a. a.*, and with them th straps carrying the selvages of the muslin, to be draw further apart, and consequently to stretch or distend th muslin to the desired width. The frames are held i this state by means of the ratchet-wheel and pull s. upon the winch *n.*, while the cloth is undergoing th operations of drying and finishing.

“ We may now observe that any suitable number o these machines may be ranged side by side, or one above the other, and heated by hot air flues, or any other convenient mode.

“ We now proceed to describe the further process of finishing the goods, for the purpose of taking out the rigid stiffness of the piece, and causing it to feel soft and pliant, which is accomplished by bringing other parts of the mechanism into operation, while those just described are set at rest; which is effected by a vibratory apparatus, causing the goods to be stretched diagonally by



repeated operations of the vibratory apparatus, during the process of drying. It will be perceived that the lever *t. t.* has two notches *u. v.* formed in it; and, when the operator lifts the notch *u.* from off the piece *w.*, and places the notch *v.* on to the pin or stud *x.*, at the top of the vibrating lever *y.*, this part of the mechanism is put into action. An upright shaft, *z.*, connected with the main driving power, carries the eccentric 1., which by revolving vibrates the lever 2. keyed upon the same shaft, 3., as the lever *y.* This connection causes the lever *y.* to slide the lever *t. t.* backwards and forwards through the same length of traverse as the diameter of the eccentric. Now, as this lever *t. t.* is attached to the framings *f. f.* (or it may be to the rails *a. a.*, if more convenient), it will cause these reciprocating frames to vibrate upon their centres *i. i.*, as shewn by red lines in figure 1., and to slide the rails longitudinally, which will draw the weft-threads of the cloth alternally into oblique positions, as shewn in the drawing, thus causing the threads of the fabric to be strained into alternate diagonal positions at every revolution of the driving-shaft *z.*; the effect of which will be, that, by thus alternately shifting the oblique directions of the threads, the stiffening, or starch, which filled the interstices, will become broken between the meshes of the fabric, and thereby the desired elasticity will be imparted to the cloth, every thread being thrown up full, round, and independent of the adjoining threads, which will be found to give a remarkable degree of brightness to the cloth, and much improve the softness of its quality. This diagonal stretching process being repeated until the cloth has become entirely dry, the attendant raises the lever *t.*, and releases the notch *u.* from off the pin *x.* on the vibrating lever *y.*, and places the notch *v.* upon the catch-piece *w.*, which will throw this vibrating apparatus out of gear, and at the same

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time, by putting the pinions *k. k.* into gear again with the wheels *m. m.*, and driving them the reverse way, will cause the strap-pullies and straps to deliver the finished cloth into the hands of the attendants at the right-hand end of the machine, in the same manner that it was taken from them in commencing the operation.

“ We would further remark, that we are perfectly aware that many simple contrivances might be devised for effecting the object of our improvements, viz. giving vibrating motion to the selvages of the cloth, for the purposes above stated ; but, as it is not practicable to describe every possible method in detail, we desire it to be understood that any mode even of moving one side or selvage of the cloth whilst the other remains stationary, we shall consider to be an evasive imitation of our invention, if for the purpose of drawing the threads into diagonal positions by mechanical means instead of manual labour ; for instance, the goods may be stretched upon ordinary clamp-tables (well known in the trade), and one side made to vibrate or reciprocate backwards and forwards while the cloth is drying thereon ; or the straps and pins as described in the apparatus, and shewn in the drawings, instead of travelling together, may very easily be made to travel independently of each other, and to progress by alternate advancing movements ; or, the whole apparatus may be constructed of a cylindrical form, instead of horizontally, as is represented in the drawing, and have either a continuous or interrupted rotatory motion, and still be so contrived as to give a reciprocating action to the selvages of the cloth distended thereon. But any of these, or similar modifications of the apparatus above particularly set out, would be *merely mechanical variations* of the proposed improvements in stretching, drying, and finishing woven fabrics.”



It appeared from the plaintiffs' evidence, that the only novelty in the invention consisted in the mechanism by which the vibrating motion was imparted to the cloth while in the course of drying; that this was an improvement of considerable value; and that the defendant had adopted it, slightly varying its application.

The indentures of the 1st of *May*, 1835, and 21st of *April*, 1840, were then put in. The former was an indenture between *Bridson* of the first part, the plaintiffs below and *Hick* of the second part, and two classes of creditors of *Bridson*, each consisting of a greater number of persons than twelve, of the third and fourth parts. By this deed, *Bridson* assigned to the plaintiffs below and *Hick* all his estate and effects (including the patent right), in trust for the benefit of his creditors; and it was therein provided that the business should be carried on by, or under the inspection of, the trustees, until the liquidation of *Bridson's* debts, the profits to be divided ratably amongst the creditors, until their several demands should be fully satisfied, with interest thereon at 4l. per cent.; and the creditors covenanted to indemnify the trustees against any loss that might be incurred.

The plaintiffs' case being closed, the defendant called numerous witnesses to prove that the invention was not, at the date of the letters-patent, a new invention: and it was insisted on his behalf that the lord chief justice ought to direct the jury, that the invention claimed was not for the movable and vibratory motion only; that, if the invention claimed was for the movable frame and vibratory motion only, the title of the patent was not supported; that the specification was bad, for not distinguishing, upon the face of it, either alone or taken in connection with the drawings, what was new from what was old; and also that the deeds of *May*, 1835, and *April*, 1840, vested the letters-patent in trust for more than twelve persons, as partners, within the mean-

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ing of the proviso of the letters-patent. But the lord chief justice refused so to direct the jury; and “thereupon summed up and directed the jury without directing them that the invention claimed was not for the movable frame and vibratory motion only, — and without directing the jury, that, if the invention claimed was for the movable frame and vibratory motion only, the title of the patent was not supported, — and without directing the jury that the specification was bad, as not distinguishing upon the face of it, either alone or taken in connection with the drawing, what was new from what was old, — and without directing the jury that the deeds of *May*, 1835, and of *April*, 1840, vested the letters-patent in trust for more than twelve persons, as partners, within the meaning of the proviso of the letters-patent.”

“Whereupon the counsel for the defendant did then and there except to the aforesaid summing up and direction of the lord chief justice, and contend against the same, and insist — first that the said lord chief justice ought to have directed the jury that the invention claimed is not for the movable frame and vibratory motion only — secondly, that, &c. &c. And the counsel for the defendant then and there prayed the said lord chief justice to give his opinion and direction to the jury accordingly. But the counsel for the plaintiffs did contend the contrary; and the said lord chief justice did refuse to direct the jury as aforesaid.” The jury found for the plaintiffs upon all the issues.

A writ of error having been brought, the exceptions now came on for argument before *Parke*, B., *Patterson*, J., *Williams*, J., *Rolfe*, B., *Wightman*, J., and *Platt*, B.

*Webster*, for the plaintiff in error. The construction of the specification is for the court: *Neilson v. Har*



1) If, as the lord chief justice thought, in this the substance of the invention was the movable and vibratory motion only, the title of the specification is insufficient. And, the direction having been that the jury *may* have been misled, the exceptions are allowed: *Househill Company v. Neilson*. (b) Mere deficiency of title does not vitiate a patent: but here is a *false* suggestion; the title being, for “*improvement in machinery or apparatus for stretching, drying, finishing woven fabrics.*” In *Morgan v. Seaward* (c), it was held, that, if a patent be taken out for several inventions, which are claimed as *improvements*, and the patent is found that one of them is not an improvement, the patent is altogether void. Parke, B., in giving the judgment of the court, there says: “Upon the authorities we feel bound to hold that the patent is void, on the ground of fraud on the crown, without entering into the question whether the utility of each and every part of the invention is essential to a patent, or whether such utility is not suggested in the patent itself on the ground of the grant. That a false suggestion of utility avoids an ordinary grant of lands or tenements from the crown, is a maxim of the common law: and such a grant is void, not against the crown merely, but in a suit against a third person (d): *Travell v. Carre*; *Alcock v. Cooke*. (g) It is on the same principle that a patent for two or more inventions, when the first is not new, is void altogether; as was held in *Hill v. Thompson* (h), and *Brunton v. Hawkes* (i); for, al-

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8 M. & W. 806., 1 Webster, P. C. 370.

1 Webster, P. C. 711,

2 M. & W. 544.

And see *The Earl of Arundel's case*, H. 21 E. 3, fo. 47, 10; *Fitz. Abr.* tit. *Travers*,

pl. 41.; 4 M. & G. 1030. n. (a) and (b).

(e) 3 Lev. 135.

(g) 5 Bingh. 340., 2 M. & W. 625.

(h) 2 J. B. Moore, 424., 8 Taunt. 375, 3 Meriv. 622.

(i) 4 B. & Ald. 541.



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though the statute invalidates a patent for want of novelty, and consequently, by force of the statute, the patent would be void, as far as related to that which was old, yet the principle on which the patent has been held to be void altogether, is, that the consideration for the grant is novelty of all, and, the consideration failing, or, in other words, the crown being deceived in the grant, the patent is void, and no action maintainable upon it." In *Brunton v. Hawkes*, Bayley, J., says (a) "If a patent is taken out for many different things, the entire discovery of all those things is the consideration upon which the King is induced to make the grant. That consideration is entire, and, if it fails in any part, fails *in toto*. Upon an application for a patent, although the thing may be new in every particular, it is in the judgment of the crown whether it will or will not, as matter of favour, make the grant to the person who has made the discovery. And, when an application is made for a patent for three different things, it may be considered by the persons who are to advise the crown as to the propriety of the grant, that the discovery as to the three things together may form the proper subject of a patent, although each *per se* would not induce them to recommend the grant." The same principle is established in *The King v. Wheeler* (b), and *The King v. Metcalf*. (c) The point was much considered in *Sturz v. De A. Rue* (d), where Lord Lyndhurst, C., says: "The description in the patent must unquestionably give some idea, and, so far as it goes, a true idea, of the alleged invention, though the specification may be brought in aid to explain it." Here, the title gives no idea whatever of the alleged invention, if it consist in the vibratory motion only. Then, the specification is bad, for not sufficiently distinguishing between what was old and

(a) 4 B. &amp; Ald. 552.

(b) 2 B. &amp; Ald. 345.

(c) 2 Stark, N. P. C. 249

(d) 5 Russ. 322.



**what new.** In *Carpenter v. Smith* (a), Lord Abinger says: "It is required, as a condition of every patent, **that** the patentee shall set forth in his specification a **true** account and description of his patent or invention; **and** it is necessary in that specification that he should **state** what his invention is, what he claims to be new, **and** what he admits to be old; for, if the specification **states** simply the whole machinery which he uses, and **which** he wishes to introduce into use, and claims the **whole** of that as new, and does not state that he claims **either** any particular part, or the combination of the **whole**, as new, his patent must be taken to be a patent for the whole, and for each particular part, and his patent will be void, if any particular part turns out to be old, or the combination itself not new." So, in *Macfarlane v. Price* (b), it was held, that, in the specification of a patent for an *improved* instrument, it is essential to point out precisely what is new and what is old, and it is not sufficient to give a general description of the construction of the instrument, without making such distinction, although a plate is annexed, containing a detached and separate representation of the parts in which the improvement consists. And Lord Ellenborough said: "The patentee, in his specification, ought to inform the person who consults it, what is new and what is old. He should say, my improvement consists in this — describing it by words, if he can, or, if not, by reference to figures. But, here, the improvement is neither described in words nor by figures; and it would not be in the wit of man, unless he were previously acquainted with the construction of the instrument, to say what was new and what was old. 'The specification states, that the improved instrument is made in manner following: this is not true; since the description com-

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(a) 1 Webster, P. C. 530.      (b) 1 Stark. N. P. C. 199.



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prises that which is old, as well as that which is new. Then, it is said, that the patentee may put in aid the figures; but, how can it be collected from the whole of these in what the improvement consists? A person ought to be warned by the specification against the use of the particular invention; but it would exceed the wit of man to discover from what he is warned in a case like this.<sup>a</sup> Here, the evidence shews, that, to a certain point, the machinery was confessedly old: and the wit of the witnesses was severely taxed, to state where the novelty commenced; no two of them precisely agreeing in the construction they put upon the specification. In the recent case of *The Queen v. Nickels* (a), Lord Denman adopted the view taken by Lord Ellenborough in *Macfarlane v. Price*. In *Bovill v. Moore* (b), it was held, that, where a person obtains a patent for a machine consisting of an entirely new combination of parts, though all the parts may have been used separately in former machines, the specification is correct in setting out the whole as the invention of the patentee: but that, if a combination of a certain number of those parts has previously existed, up to a certain point, in former machines, the patentee merely adding other combinations, the specification should only state such improvements, though the effect produced be different throughout. That is precisely this case. Again, in *Hill v. Thompson* (c), Dallas, C. J., said: "This, like any other patent, must undoubtedly stand on the ground of improvement or discovery. If of improvement, it must stand on the ground of improvement invented; if of discovery, it must stand on the ground of the discovery of something altogether new: and the patent must distinguish, and adapt itself accordingly. If the patent be taken out for discovery,

(a) *Hindmarch on Patents*,  
 186.

(b) 2 *Marsh*. 211.

(c) 8 *Taunt.* 375., 2 *J. B. Moore*, 424.



when the alleged discovery is merely an addition or improvement, it is scarcely necessary to observe that it will be altogether void." The last ground of exception is, that the lord chief justice ought to have directed the jury that inasmuch as the deeds of the 1st of *May*, 1835, and the 21st of *April*, 1840, vested the letters-patent in trust for more than twelve persons as partners, within the meaning of the proviso, the patent was rendered void. By the first deed, all the creditors parties thereto became partners in the trade carried on by *Bridson*, sharing the profits, and covenanting to contribute to losses; and it appears that the consideration for the assignment of *Latham's* share of the patent, was money vested in the trustees under that deed.

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Sir *T. Wilde*, Serjt. (with whom were *Crompton* and *Atherton*), for the defendants in error. The bill of exceptions does not, as it ought to do, shew how the lord chief justice did direct the jury; it merely states that he declined to direct them in a particular way. But, assuming that the exceptions are sufficiently formal, there is no ground whatever for either of them. With respect to the deed of *May*, 1835, there clearly is nothing therein to vitiate or in any way affect this patent. The question is, whether, where the effects of a trader are assigned for the benefit of his creditors, the trade to be carried on under the inspection of trustees, and the profits applied in liquidation of the debts, the creditors become *partners* within the meaning of the proviso in the letters-patent? The whole scope and object of the deed was, to provide a fund for the payment of the debts by instalments. The covenant for indemnifying the trustees, does not constitute such a mutual participation of losses as to make them partners. The parties to this deed are no more *partners* in the concern, than the creditors under a bankruptcy are. [*Parke*, B. At the



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most, the creditors can have only a mortgage upon the profits of the trade to the amount of their respective debts. The general body of creditors would not be responsible to persons furnishing goods to the concern. Clearly not. They are not carrying on the business for gain, but merely as a mode of obtaining payment of their debts.

PARKE, B. If we were called upon to decide *this* point, we are all agreed that we should have no hesitation in saying that there is no assignment of the benefit of the patent to, or in trust for, more than twelve persons, as partners within the terms of the proviso in question. But the form of the exception, we think, precludes us from entertaining it.

Sir T. Wilde, Serjt. It may be conceded that the court is to construe the specification. But, in all cases of mechanical invention, there will be much that must be the subject of evidence. The exception here, is, that the lord chief justice declined to adopt a form of direction suggested to him by the defendant's counsel, quite independent of the evidence. All that the law requires in a specification is, a *bonâ fide* description of the alleged invention, that may be intelligible to persons having reasonable skill and knowledge of the subject. [*Parke, B.* The language of the specification must be read in a spirit of candour, and not with a predetermination to find fault with it.] It is impossible to read this specification in that spirit, without coming to the conclusion to which all the plaintiff's witnesses, scientific as well as practical, came, viz, that the claim of the patentees was for the diagonal or vibratory motion only.

*Webster*, in reply. A refusal on the part of a judge to direct in a way in which he is bound in point of law to



direct, is a misdirection. [*Parke, B.* That which you complain of here is a non-direction, which clearly cannot be made the subject of a bill of exceptions. You do not tell us what the chief justice told the jury.] The whole bill of exceptions would be insensible, unless the direction was that the vibratory motion was the only invention claimed. That clearly was wrong: for, the specification throughout professes to claim in respect of improvements in machinery or apparatus for three several objects, the stretching, the drying, and the finishing of woven fabrics. [*Parke, B.* The real question is, whether the specification claims the whole combined machinery, or only that part of it which the defendant below infringed. The addition of the vibratory motion might be the subject of a patent: and you have not excepted, on the ground that the claim for the vibratory motion by any means, is too general.] The second exception covers that.

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*Parke, B.* We all are of opinion that the form in which the exceptions in this case are taken, precludes us from giving judgment for the plaintiff in error, even if we should think the argument urged on his behalf well founded. It is misdirection, and not non-direction, that is the proper subject of a bill of exceptions. We think, however, that, if the exceptions had been strictly formal, they would not have availed: for, it seems to us that the specification does not claim the whole machine, but only that part of it which relates to the vibratory motion. The patentees begin by describing their improvements to consist in a novel arrangement of mechanism for the purpose of stretching, drying, and finishing woven fabrics. They afterwards go on to explain their mode of conducting the operation, evidently referring to some known mode of stretching and drying cloth: and, towards the close, they remark that they are



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aware that many simple contrivances might be devised for effecting the object of their improvements, viz. *giving vibratory motion to the selvages of the cloth*, for the purposes above stated : but, they go on to say “as it is impracticable to describe every possible method in detail we desire it to be understood that any mode even moving one side or selvage of the cloth whilst the other remains stationary, we shall consider to be an evasion, imitation of our invention, if for the purpose of drawing the threads into diagonal positions by *mechanical means* instead of manual labour.” The beginning and the end of the specification, it is true, rather bear the aspect of claiming the machinery for the whole process. But, taking the specification altogether, and giving its words a fair and reasonable interpretation, it seems to be obvious that the patentees only claim as their invention those improvements on the old machine that give the vibrating motion to the fabric while in the course of drying. Such being our opinion, an application for leave to amend the bill of exceptions would not avail.

Judgment for the defendants



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## IN THE HOUSE OF LORDS.

BRANDÃO v. BARNETT and Others.

August 28.

**T**ROVER, for exchequer bills. Pleas — first, not guilty — secondly, that the plaintiff was not lawfully possessed of the said instruments or securities for the payment of money in the declaration mentioned, or any or either of them, in manner and form as in the declaration alleged — thirdly, a special plea, in which the defendants, as bankers, set up a claim, by way of lien, to retain the exchequer bills in question to secure the balance due to them from one *Edward Burn*, trading under the firm of *James Burn & Co.*, who held them as the agent of the plaintiff.

At the trial before *Tindal*, C. J., at the sittings at *Guildhall* after *Trinity* term, 1840, a verdict was

The general lien of bankers on securities of their customers deposited with them, is part of the law-merchant, and to be taken judicial notice of as such.

*A.* bought on account of *B.*, and with *B.*'s money, certain exchequer bills, which *A.* de-

posited in a box that he kept at his bankers', himself retaining the key. Whenever it became necessary to receive the interest on the exchequer bills and to exchange them for new ones, *A.* was in the habit of taking them out of the box and giving them to the bankers for that purpose (such being the usual course of business); which being accomplished, the new exchequer bills were, as soon as conveniently might be, handed over to and locked up by *A.* in the box, the amount of interest received by the bankers being passed to the credit of *A.*'s account. The exchequer bills themselves were never entered to *A.*'s account, nor had the bankers any notice or knowledge that they were not the property of *A.* himself.

On the 1st of *December*, 1836, *A.* took the exchequer bills out of the box, and delivered them to the bankers, for the purpose of receiving the interest and exchanging them for new ones. The bills were accordingly exchanged; but the new bills (*A.* being absent from business on account of illness) remained in the possession of the bankers down to the time of *A.*'s failure, on the 23rd of *January*, 1837, his account in the mean time having been considerably overdrawn: —

Held, in an action at the suit of *B.*, the true owner (reversing the judgment of the Exchequer Chamber), that the bankers had no lien upon these exchequer bills for the general balance due to them from *A.*, although such securities are transferable by delivery; the circumstances under which they came to their hands being inconsistent with the existence of a general lien.



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found for the plaintiff, subject to a special case, with liberty to either party to turn it into a special verdict. The case was argued in the court of Common Pleas in *Michaelmas* term, 1840, and judgment was given thereon for the plaintiff.<sup>(a)</sup> The special case was afterwards turned into a special verdict, which was in substance as follows:—

The plaintiff is a Portuguese merchant, who up to the year 1834 resided at *Rio de Janeiro*, but who in that year returned to *Portugal*, and has since resided at *Lisbon* and other towns in that country.

*Edward Burn*, for many years before and down to his bankruptcy hereinafter mentioned, resided in *London*, and carried on business as a merchant, under the firm of *James Burn & Co.* He was the correspondent of the plaintiff, who from time to time remitted bills of exchange and money to him, and employed him upon commission to invest the proceeds in exchequer bills. *Burn* was also employed by other correspondents to purchase exchequer bills for them.

Defendants  
*Burn's* bank-  
 ers.

The defendants are bankers in *London*, in co-partnership, and acted as such for *Burn* for many years before and since the year 1833, who kept cash and an account with them under the style or firm of *James Burn & Co.*

The action is brought to recover twenty-one exchequer bills, amounting in value to 10,100*l.*, and interest. These exchequer bills were received by the defendants in exchange for the same number of exchequer bills, which had been purchased by *Burn* for the plaintiff in manner above mentioned, and which came into the possession of the defendants as hereinafter stated; and the defendants claimed a right to hold the exchequer bills in question in respect of a debt due from *Burn* to them, hereinafter particularly mentioned.

(a) See *Brandão v. Barnett*, 1 *M. & G.* 908., 2 *Scott, N.R.* 96.



The government pay the interest upon exchequer bills at certain periods announced to the public by advertisement; and, when such interest is paid, the exchequer bills in respect of which it is paid are delivered up, and, unless their amount be applied for in money, new exchequer bills are issued to the holder in exchange for them.

*Burn* received the interest payable upon the exchequer bills, and exchanged the old exchequer bills for new ones, when necessary, having orders in that behalf so to do from the above-named plaintiff. The defendants never received any information from *Burn*, of any transaction between him and the plaintiff. *Burn*, from time to time, from *May*, 1832, and subsequently, received from the plaintiff, then abroad, as agent for him (the plaintiff), orders to purchase exchequer bills with the moneys of the plaintiff in the hands of *Burn*. *Burn*, on occasion of purchasing exchequer bills for the plaintiff, communicated that fact to him.

In the course of the correspondence, in a letter from the plaintiff to *Burn*, dated the 12th of *April*, 1834, written from *Rio de Janeiro*, at the time when the plaintiff was about to quit that place for *Lisbon*, and received by *Burn*, there is contained as follows:—“I hope you will inform my attorney (meaning his brother, whom he had appointed his attorney at *Rio de Janeiro*) of the names of the bankers in whose house the exchequer bills on my account have been deposited.” To which *Burn*, by a letter dated the 2nd of *July*, addressed and sent to and received by the plaintiff, replied as follows:—“All the exchequer bills which we have bought by your order and for your account, you judge right, are deposited for greater security in the hands of our bankers, as we advised you. They are entirely at our order, which is necessary for the purpose of exchanging them for others every time it is advertised to the public

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Course as to payment of interest, and exchange of exchequer bills.

Defendants not informed of the dealings between the plaintiff and *Burn*.

Correspondence between the plaintiff and *Burn*.



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that the interest is to be paid, which payment cannot be received without delivering up the bills upon which the interest is due, when you receive other bills for the same amount; for which reason, it cannot be of any service to you knowing the names of our bankers." The name of *Burn's* bankers never was communicated to the plaintiff.

Between *May*, 1832, and *December*, 1836, *Burn*, in pursuance of express orders to that effect given to *Burn* by the plaintiff, with funds supplied by the plaintiff, and obtained by payment of the interest on exchequer bills, purchased, by the order of the plaintiff, in manner above mentioned, exchequer bills to the amount of 30,400*l*. The exchequer bills were purchased by *Burn* through a broker, the broker dealing with *Burn* as a principal, and not knowing on whose account they were bought.

The special verdict then set out the form of the bought notes, and the particulars of all the exchequer bills so purchased by *Burn* on account of the plaintiff.

Deposit with  
the defend-  
ants.

The defendants were *Burn's* bankers; and *Burn* kept several tin boxes at the banking-house of the defendants, in which he deposited the securities which he had purchased for his different correspondents, and among those boxes was one in which he deposed the exchequer bills purchased for the plaintiff. *Burn kept the key of those boxes*, and no other securities, except some exchequer bills, were kept in the box in which they were kept.

Course of  
dealing of  
bankers as to  
exchequer  
bills belong-  
ing to their  
customers.

*It is the custom of bankers, in the course of their trade as such, to receive the interest upon exchequer bills for their customers, and to exchange the exchequer bills when such interest is paid.* *Burn* had, on various occasions prior to *December*, 1836, requested the defendants to receive the interest upon the exchequer bills so purchased as aforesaid, and also to receive the new exchequer bills issued in exchange for the former. Upon



such occasions, *Burn* went to the banking-house with the key of the tin box, took out of the box such of the exchequer bills as were wanted for that purpose, and delivered them to the defendants, requesting them to receive the interest and to exchange the exchequer bills. *Burn* generally received from the defendants the new exchequer bills within a week or a fortnight after they were so exchanged; having on one occasion only left them in their hands for a considerable time: but *Burn* was not particular as to the time. *Burn* then deposited the new exchequer bills in the said tin box.

The defendants gave credit to *Burn*, in his account with them, for the interest received by them on the exchequer bills, and such interest formed part of the cash balance to *Burn's* credit with the bankers.

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Interest credited to  
*Burn's* account.

On one occasion before *December*, 1836 (but at what particular time cannot be ascertained), *Burn* delivered a number of exchequer bills to the defendants for the purpose of receiving interest and exchanging the bills, as usual, but did not ask the defendants for the exchanged bills for one or two months; but afterwards, having occasion for part of such bills, applied for them, and the defendants said they had rather *Burn* would take the whole of them, which *Burn* accordingly did, and locked them up.

In *November*, 1836, *Burn* held exchequer bills, so as aforesaid purchased with the money of the plaintiff, to the amount of 30,400*l.*, and which were locked up in the tin box at the defendants', along with two others belonging to another correspondent of *Burn* named *Alex*; and, in pursuance of an order from the plaintiff, *Burn*, in his own name as principal, sold part of those exchequer bills, through a broker who knew him only in the transaction, to the amount of 10,800*l.* The proceeds of the exchequer bills, when sold, were paid by the broker to *Burn*, in cheques payable to *Burn*, who



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paid them to the defendants, as his bankers account, as his own money; and they formed his cash balance to his credit with the defendant *Burn*, in pursuance of an order from the plaintiff, to the amount of the proceeds by bills to the order of the plaintiff in *Lisbon*. By the execution of this order, the amount of exchequer bills so as to be purchased with the plaintiff's funds, was reduced to 19,600*l.* Of these exchequer bills, 9500*l.* were delivered by *Burn* to *Offley & Co.*; and there were left in *Burn's* hands exchequer bills, so purchased aforesaid with the money of the plaintiff, to the amount of 10,100*l.*, and the renewals of which are the exchequer bills sought to be recovered in this action.

In *December*, 1836, an advertisement appeared announcing that the interest would be paid upon a new class of exchequer bills, including all those in the old box, and the exchequer bills changed for new bills on or about the 15th of that month.

Delivery of  
the exchequer  
bills to the  
defendants, to  
receive in-  
terest, and to  
exchange  
them.

On or about the 1st of the same month of *January*, 1837, *Burn* went to the banking-house of the defendants, and whilst alone, took from the box the said exchequer bills, and brought and delivered them to one of the defendants, and requested him to get them exchanged. The defendants procured the exchequer bills to be changed for, and at the instance of, *Burn*. On the 1st of *February*, 1837, the exchequer bills so delivered in exchange to the defendants was in the following form, and was made under an act of parliament made and passed in the 6 & 7 *W. 4. c. 113.*, intituled, &c.:—

Form of ex-  
chequer bills.

“ No. 8551. £1000. By virtue of an act of the 7<sup>th</sup> of *Gulielmi 4<sup>th</sup> Regis*, for raising the sum of 14,000*l.* by exchequer bills, for the service of the year 1836, this bill entitles ———, or order, to one thousand pounds, and interest after the rate of two pence per penny *per centum per diem*, payable out of the f



or supplies to be granted in the next session of parliament; and this bill is to be current and pass in any of the public revenues, aids, taxes, or supplies, or to the account of His Majesty's Exchequer at the Bank of *England*, after the fifth day of *April*, 1837. Dated, at the Exchequer, this 19th day of *December*, 1836.

“ *J. Newport.*

“ If the blank is not filled up, this bill will be paid to bearer.

“ The cheques must not be cut off.”

The other exchequer bills were in the same form, six of them being for 1000*l.* each, and numbered 8552—7, four of them for 500*l.* each, and numbered 2467—70, one for 200*l.*, numbered 1213, and nine for 100*l.* each, numbered 5012—20. The blanks in the bills had not been filled up; and *they were securities payable to bearer, and transferable by delivery.*

The defendants, on the 20th of *December*, delivered up the bills so received from *Burn*, obtained the interest due upon them, and the new exchequer bills in exchange, which they have ever since held in their possession. These new bills are sought to be recovered in this action. [The particulars of them were set out.]

At the time *Burn* delivered the exchequer bills to the defendants, he was unwell, and within a few days afterwards became worse; and, on account of his illness, was absent from his counting-house three or four weeks, at his house at *Roehampton*; and he was not during that period in town above three times, until his subsequent failure in business, which took place on the 23rd of *January*, 1837. *Burn* during this period was unable to attend to his business, except on particular occasions; but he communicated with his clerks when any thing was wanted. He was informed of the state of his cash at his bankers', and he signed cheques and accepted bills when necessary; and letters were from time to

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time brought to him to read and sign; and he was informed of the payments made to the defendants on his account, and by the defendants for him. *Burn* was in town upon one or two occasions between the time of the delivery of the exchequer bills to the defendants and his stopping payment. One time was two or three days before the 14th of *January*; and he never was at the banking-house of the defendants, nor had any communication whatever with them, except that during the interval *Burn* desired his clerk to procure from the defendants the particulars of all the exchequer bills received in exchange for those given by him to be exchanged; and the defendants furnished to the clerk a paper containing the particulars (which were set out) of twenty-three exchequer bills, in the whole amounting to 11,300*l*.

Two of those exchequer bills were received in exchange for the two bills which belonged to *Abreu*. The remainder of the exchequer bills set forth, were received in exchange for those purchased as aforesaid with the moneys of the plaintiff: the defendants were not aware of any distinction between them, or that they did not belong to *Burn*.

*Burn* never overdrew his bankers' account but once; and that occurred a considerable time before the year 1837, and by mistake, to the extent of about 100*l*.; and at that time the defendants had not any exchequer bills in their hands so purchased by *Burn* for his correspondents. [The special verdict then set forth the daily state of *Burn*'s account with the defendants, from the 26th of *November*, 1836, until he stopped payment, on the 23rd of *January*, 1837.]

*Burn* occasionally resorted to the tin boxes which he kept at the defendants', and in which he deposited the securities of his foreign correspondents; and the defendants have sometimes been present, and general con-



versation has passed between the defendants and *Burn*; but the only conversation that ever occurred respecting the foreign securities took place some time before the delivery of the exchequer bills in question, when, being then engaged in looking over the foreign securities in some of the boxes, and the defendants, or some of them, being present, *Burn* observed to one of the defendants that the foreign securities were very troublesome, or that it was troublesome to have so many foreign securities. The foreign securities referred to were *Brazilian*, *Portuguese*, and *Dutch* bonds, and the like. There were no foreign securities in the box in which the exchequer bills were deposited.

It was *Burn's* course of business to make his bills payable at the defendants', who had been his bankers for many years, which bills the defendants paid at maturity, having always funds of *Burn's* in their hands for that purpose, except as hereinafter mentioned. *Burn* also drew cheques upon the defendants, as his bankers, in the usual way, and which they paid according to the usual course of business. On the 21st of *January*, there were bills of exchange outstanding, accepted by *Burn*, and made payable, according to the usual course of business, at the defendants' banking-house, to the amount of 4808*l.* 10*s.* 7*d.*, and which became due on that day. [The particulars were set out.] The said bills were presented for payment at the defendants', and paid by them in the usual course of banking business.

The balance upon *Burn's* account, on the morning of that day, viz. the 21st of *January*, amounted to 1596*l.* 11*s.*; but, by the payment of the said bills, that sum was absorbed, and the balance turned against him, and in favour of the defendants, to the amount of 3211*l.* 19*s.* 7*d.*; and *Burn* upon that day was, and still is, indebted to the defendants in the said sum of 3211*l.* 19*s.* 7*d.* on his banking account, — for which sum the defendants insist upon their right to hold possession of the exchequer

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Course of  
business as to  
bills of ex-  
change and  
cheques.



brought a writ of error. The Exchequer on *Trinity* vacation, 1843, reversed the judgment of the court of Common Pleas; holding — first, that courts will take judicial notice of the general lien which bankers have, by the law-merchant, on the securities in their hands — secondly, that the chequer bills in question, having come to the hands of the defendants *as bankers*, in the usual course of business, were subject to such general lien. (a)

Upon this judgment, the defendant in error (below) brought a writ of error, returnable in parliament, and the case was argued on the 25th of *February*, the 3rd, 9th, and 10th of *March* last.

Sir *T. Wilde*, Serjt., *W. H. Watson*, and *M. J. B. Ashurst*, the plaintiff in error, admitted that bankers have a general lien on the securities, *belonging to their customers*, deposited with them, to secure their general claims, but insisted that such lien extended only to securities coming to their hands *as bankers*, and did not extend to securities belonging to third persons, or deposits for safe custody — citing *Rushforth v. Hadfield*, *Pennington v. Russell* (c), *Lucas v. Dorrien* (d), and *Lucas v. Cooper* (e); and that the special verdict showed that the deposit in this case was not a deposit of securities with the defendants *as Burn's bankers*, but



deposit of the box in which they were contained, for the custody, like an ordinary deposit of plate or jewels in a chest or box.

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The following cases were cited in the course of the argument: — *Kruger v. Wilcox* (a), *Drinkwater v. Good-*  
*win* (b), *Collins v. Martin* (c), *Naylor v. Mangles* (d),  
*Olderness v. Collinson* (e), *Scarfe v. Morgan* (g), and  
*Ewison v. Guthrie*. (h)!

Sir Fitzroy Kelly, S. G., and S. Martin, for the defendants in error, submitted, that the right of lien, well in the case of bankers as in that of wharfingers and factors, is matter of law, and, as such, need not be pleaded or proved in each case — *Abbott on Shipping* (i); *Naylor v. Mangles* (d); that negotiable instruments, like exchequer bills, are transferable by delivery; that a banker, having *bonâ fide* received them from a customer, in the usual course of his business as a banker, and without notice that they belong to a third person, has a valid lien upon them for his general balance; and that the circumstances under which the exchequer bills in question came to the hands of the defendants, as stated in the special verdict, gave them a right of lien thereon: *Davis v. Bowsher* (k), *Bolland v. Bygrave* (l); *Jourdain v. Lefevre* (m); *Bosanquet v. Dudman* (n); *Collins v. Martin* (c); *Wookey v. Pole* (o); *Vanderzee v. Willis* (p); *Stevenson v. Blakelock*. (q).

Cur. adv. vult.

(a) *Ambler*, 252.(b) *Cowp.* 251.(c) 1 *B. & P.* 648.(d) 1 *Esp. N. P. C.* 109.(e) 7 *B. & C.* 212., 1 *M. & R.* 55.(g) 4 *M. & W.* 270., 1 *Horn & H.* 292.(h) 2 *N. C.* 755., 2 *Scott*, 298.(i) 5th edit. p. 364.; 7th ed. by Serjt. *Shee*, p. 511.(k) 5 *T. R.* 488.(l) *R. & M.* 27(m) 1 *Esp. N. P. C.* 66(n) 1 *Stark. N. P. C.* 1(o) 4 *B. & Ald.* 1.(p) 3 *Bro. Ch. C.* 21.(q) 1 *M. & S.* 535.



the balance due to them from *Burn*.

The usage of trade by which bankers are entitled to a general lien, is not found by the special verdict, and, unless we are to take judicial notice of it, the plaintiff is at once entitled to judgment. But, my Lord, I am of opinion that the general lien of bankers is part of the law-merchant, and is to be judicially noticed, like the negotiability of bills of exchange, or the time of grace allowed for their payment. When a usage has been judicially ascertained and established, it becomes part of the law-merchant (*a*), which courts of justice are bound to know and recognise. (*b*) Such has been the invariable understanding and practice in *Minster Hall* for a great many years; there is no decision or dictum to the contrary; and justice could not be administered, if evidence (*b*) were to be given, *toties quoties* to support such usages, an issue being joined upon them, in each particular case.

It is hardly disputed, that, under the plea of "not assented," a lien may be made available as a defence, and, therefore, if this special verdict sets forth facts which shew, that, by the law-merchant, the defendants had a lien upon these exchequer bills, the judgment in their favour ought to be affirmed. But I am of opinion that, upon the facts found, there was no lien, and that the judgment ought to be reversed.



I do not, however, proceed upon the ground taken by the court of Common Pleas,—that, these Exchequer bills being the property of *Brandão*, there was no lien as against *him*, although there might have been as against *Burn*. I think that the defendants were entitled to consider the Exchequer bills as the property of *Burn*, without any express representation by him to that effect. Exchequer bills are negotiable securities passing by delivery. The holder of negotiable securities is to be assumed to be the owner; and third persons, acting *bonâ fide*, may treat with him as owner. It is admitted that *Burn* might have effectually sold these exchequer bills, or pledged them, by an *express* contract, without any representation that they were his own property. But the right acquired by a general lien, is that of an implied pledge; and, where it would arise,—supposing the securities to be the property of the apparent owner,—I think it equally exists, the party claiming it having acted with good faith, although they turn out to be the property of a stranger. I think that the just view was taken of this point by the judges in the Exchequer Chamber, and that they were right in holding the reasoning of the judges of the court of Common Pleas to be, in this respect, untenable.

But, my lords, after much anxious consideration, I have come to the conclusion, that the judges in the Exchequer Chamber have erroneously decided the question on which the court of Common Pleas expressed no opinion; and that the facts found by the special verdict, would not have entitled the defendants to a lien, if the exchequer bills had been the property of *Burn*.

Bankers, most undoubtedly, have a general lien on all securities deposited with them, as bankers, by a customer, unless there be an express contract, or circumstances that shew an implied contract, inconsistent with lien. Lord *Kenyon* says, in *Davis v. Bowsher* (a),

(a) 5 T. R. 491. Vide 6 M. & G. 659. (c)

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press or implied, inconsistent with a right of lien to return them absolutely, at all events, to the defendants at a certain time,—the case would have been different.

Now, my lords, it seems to me, that, in the case, there was an implied agreement on the part of the defendants, inconsistent with the right of lien which they claim. Your lordships will bear in your recollection that the exchequer bills for which this case was brought, are the new exchequer bills, which the defendants obtained for the express and only purpose of being delivered by them to *Burn*, that he might deposit them in the tin box of which he kept the key. The bills not only were not entered in any account between the defendants and the exchequer, but they were not to remain in the possession of the defendants; and the defendants, in respect of them, were employed merely to carry and hold till the deposit in the tin box could be conveniently accomplished. Whether this deposit was made the same hour in which the securities were obtained from the government, without even being placed in a drawer belonging to the defendants, or the lapse of some days, seems to me quite immaterial, bearing in mind the purpose for which they were obtained, and for which they remained in the possession of the defendants. Nor can it make any difference, whether the particular occasion out of which this act



time had elapsed from the obtaining of the securities without their being demanded by him for the purpose of being locked up in the tin box; for, if the defendants had not a right of lien upon them the moment they obtained them, the actual lien clearly could not afterwards be claimed, when *Burn's* account had been overdrawn. Nor, I presume, can any weight be attached to the circumstance that the tin box in which the exchequer bills were to be locked up, and of which *Burn* kept the key, remained in the house of the defendants. Were not these exchequer bills obtained by the defendants to be delivered to *Burn*, who was himself to be the depositary and custodian of them? Bankers have a lien on all securities deposited with them as bankers; but these exchequer bills cannot be considered as deposited with the defendants as bankers.

During the argument in the Exchequer Chamber, it was very properly admitted by Sir *Fitzroy Kelly* (a), that, "if bills of exchange were delivered to a banker merely for the purpose of being deposited in a box, there would be no lien." Does it signify whether the defendants were *to deposit* the securities in the box themselves, or were *to deliver* them *for that purpose* to *Burn*? I think, that, under such circumstances, bankers acquire no lien, either upon the bills to be exchanged, or upon the bills received in exchange.

It is hardly denied, that, if there had been an express undertaking by the defendants — to exchange the bills, and to return the new ones as soon as obtained, to *Burn*, that he might lock them up, — no lien would have been acquired. But the special verdict shews the course of dealing between the parties, and states facts which raise an implied promise on the part of the defendants, which operates as if it were express. This seems to me to be like the case put of bank-notes given

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(a) 6 M. &amp; G. 652., 7 Scott, N. R. 321.



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to a banker to procure a bank-post bill for a customer or a promise by a purchaser to pay ready money ; which excludes set-off. (a) There can be no implied right inconsistent with a positive obligation.

It certainly would be most inconvenient, if a lien could be claimed under such circumstances ; for, then, an agent holding exchequer bills for another, could not, although he should keep them carefully guarded under lock and key, employ a person to get them exchanged when it happens to be a banker, lest he might, without being aware that he is acting improperly, commit a crime for which he would be liable to very serious punishment.

Much stress was laid upon the finding that "it is the custom of bankers, in the course of their trade, as such, to receive the interest upon exchequer bills for the customers, and to exchange the exchequer bills when such interest is paid : " but there is no finding that the exchequer bills for which this action is brought, and on which the lien is claimed, were in the possession of the defendants in the course of their trade as bankers, or that it was their duty as bankers to perform these offices. I think the transaction is very much like the deposit of plate, in locked chests, at a banker's. A special verdict might find that it is the custom of bankers, in the course of their trade, as such, to receive such deposits from their customers : but I do not think, that, from that finding, a general lien could be claimed on the plate chests. In both cases, a charge might be made by the bankers, if they were not otherwise remunerated for their trouble.

I further beg leave to observe, that, in a course of dealing like this, where the old exchequer bills are immediately to be delivered to the government, and the new exchequer bills are to be locked up in the box of the customer, it can hardly be supposed that the bankers will accept or pay bills of exchange for their customers.

(a) *Sed vide Eland v. Karr*, 1 East, 375., *Taylor v. Okey*, 13 Ves. 180.



on the credit of securities that, in the usual course of dealing, are for so short a time to be in their custody.

No reliance, I think, can be placed on the circumstance of the interest received on the old exchequer bills going to the credit of the account of the customer; for, while he gives the bankers the interest to keep for him, with one hand, he locks up the new exchequer bills in his tin box, with the other.

Upon the whole, my lords, I would humbly advise your lordships to give judgment for the plaintiff in error. If your lordships should concur with me, this judgment will leave untouched the rule that bankers have a general lien on securities deposited with them as bankers, but will prevent them from successfully claiming a lien on securities delivered to them for a special purpose inconsistent with the existence of the lien claimed.

I move your lordships that the judgment of the court of Exchequer Chamber be reversed.

Lord LYNDHURST, C. My lords, I entirely concur in the opinion which has been so clearly and so fully expressed by my noble and learned friend. With respect to some of the points in the case, no doubt whatever can for a moment be entertained. I think there is no question, that, by the law-merchant, a banker has a lien upon securities deposited with him for his general balance. I consider this as part of the established law of the country: the courts will take notice of it; it is not necessary to plead it; nor is it necessary that it should be given in evidence in the particular instance. Therefore, as to that part of the case, I think it is entirely free from doubt.

The only question that remains to be considered, is, whether the facts of this case bring this deposit within the general rule. I think the argument and reasoning of my noble and learned friend are decisive on the

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subject; and that the case is not within the general rule. The deposit in this instance was not such, under all the circumstances, as to give the bankers a lien upon the exchequer bills. They were deposited in a box in which they were kept under lock and key; the key was kept not by the bankers, but by the party, *Burn*, who was the holder. From time to time, he called for the purpose of taking the exchequer bills out of the box, in order that the interest upon them might be received; or, when the bills were called in by the government, in order that they might be exchanged for others. *Burn* himself attended on those occasions: he took the bills out of the box; he delivered them for that special purpose to the bankers. They were always returned almost immediately. The first time he appeared at the bankers after a transaction of this kind, the exchequer bills were delivered to him, and they were again put under lock and key in the same place of deposit.

It is impossible, considering how this business was carried on, that we can come to any other conclusion than this, that it was the understanding between the parties that the exchequer bills were to be returned after the interest was received, or after they were exchanged. If so, and that was the understanding,—the fair inference from the transaction,—it is quite clear that there could be no lien, and that the case does not come within the general rule. What my noble and learned friend has stated, is, I think, perfectly correct, that, although from the accidental circumstance of the illness of *Burn*, these exchequer bills happened to remain for a longer period in the hands of the bankers than was usual, that accidental circumstance alone will not vary the case, or give the bankers a lien, if, under other circumstances, that lien would not have attached.

I entirely concur in the judgment of my noble and learned friend.

**Judgment reversed.**



# CASES

ARGUED AND DETERMINED

1846.

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IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term,

IN THE

TENTH YEAR OF THE REIGN OF VICTORIA.

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The judges who usually sat in banco in this term, were,

WILDE, C. J.

MAULE, J.

COLTMAN, J.

V. WILLIAMS, J.

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## MEMORANDA.

### OPENING OF THE COURT TO THE BAR GENERALLY.

By the statute 9 & 10 *Vict. c. 54.*, intituled “An act to extend to all barristers practising in the superior courts at *Westminster*, the privileges of serjeants-at-law in the court of Common Pleas,” — reciting that “it would tend to the more equal distribution, and to the more frequent despatch, of business in the superior courts of common law at *Westminster*, and would, at the same time, be greatly for the benefit of the public (a),

9 & 10 *Vict. c. 54.*

Royal assent,  
18th *August*,  
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(a) As to this preamble, see note B. at the end of this volume.



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if the right of barristers at law to practise, plead, and to be heard, extended equally to all the said courts; but, by reason of the exclusive privilege of serjeants-at-law, to practise, plead, and have audience, in the court of Common Pleas at *Westminster* during term time, such object cannot be effected without the authority of parliament" — it is enacted, "that, from and after the passing of this act, all barristers at law, according to their respective rank and seniority, shall and may have and exercise equal rights and privilege of practising, pleading, and audience, in the said court of Common Pleas at *Westminster* with the said serjeants-at-law; and it shall be lawful for the justices of the said court, or any three of them, — of whom the lord chief justice of the said court shall be one, — to make rules and orders, and to do all other things necessary, for giving effect to this enactment."

#### REGULATION AS TO ORDER OF MOVING ON THE LAST DAY OF TERM.

On the last day of this term, the lord chief justice intimated to the bar, that, in future, he would, on the last day of term, call upon the gentlemen in the back row to move first, as was the practice in the other courts.

#### OBITUARY AND PROMOTIONS.

On the 3d of *July* last, Sir *Thomas Wilde*, Knight, Q. S., was appointed Her Majesty's Attorney General, and *John Jervis*, Esq., of the *Middle Temple*, Q. C., Her Majesty's Solicitor-General, upon the respective resignations of Sir *Frederick Thesiger*, Knight, and Sir *Fitzroy Kelly*, Knight.

On the 6th of *July*, the Right Hon. Sir *Nicolas Coningham Tindal*, Knight, Lord Chief Justice of Her Majesty's court of Common Pleas, died at *Folkestone*.

Sir *Thomas Wilde*, Knight, was on the 7th appointed, and on the 11th sworn, Lord Chief



justice of the court of Common Pleas ; whereupon *John Jervis*, Esq., was promoted to the office of Attorney-General, and *David Dundas*, Esq., of the *Inner Temple*, Q. C., was appointed Her Majesty's Solicitor-General. *John Jervis*, Esq., and *David Dundas*, Esq., shortly afterwards respectively received the honour of knighthood.

On the 14th day of *September*, Sir *John Williams*, Knight, one of the judges of the court of Queen's Bench, died at his residence near *Bury St. Edmund's*.

Sir *William Erle*, Knight, one of the judges of the court of Common Pleas, was removed to the court of Queen's Bench ; and *Edward Vaughan Williams*, Esq., of *Lincoln's Inn*, was appointed one of the judges of the court of Common Pleas, in the room of Mr. Justice *Erle*. Upon taking the degree of the coif, *Edward Vaughan Williams*, Esq., gave rings with the motto, '*Legum servi, ut liberi.*' He afterwards received the honour of knighthood.

The usual oaths were administered to the Lord Chief Justice *Wilde* and Mr. Justice *V. Williams*, by the senior master, on the second day of this term.

On the first day of the term, Mr. Serjt. *Talfourd* and Mr. Serjt. *Manning*, who (having previously held patents of precedence) had on the 27th of *June* last been appointed Her Majesty's serjeants-at-law, were desired to take their seats accordingly.

On the same day, Mr. Serjt. *Murphy* and Mr. Serjt. *James*, having received patents of precedence, were desired to take their seats within the bar.

On the same day, *Joseph Humphry*, Esq., of *Lincoln's Inn*, *James Bacon*, Esq., of *Lincoln's Inn*, *Spencer Horatio Rolt*, Esq., of *Lincoln's Inn*, and *John Rolt*, Esq., of *Inner Temple*, and on a subsequent day, *Charles* Esq., of *Lincoln's Inn*, who had severally been appointed Her Majesty's counsel learned in the law, were likewise desired to take their seats within the bar.

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THOMPSON and Others, Executors of JOHN  
SPRINGALL, deceased, v. E. J. LACK.

Nov. 18.

The provision in 7 & 8 Vict. c. 96. s. 25. that every sum of money payable by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities, shall be deemed and taken to be debts within the meaning of the 5 & 6 Vict. c. 116., and of that act, is not retrospective.

A release to one of two sureties who

had entered into a joint and several covenant to pay an annuity, in default of payment by the grantor, was accompanied by a proviso, that such release should not prejudice the right of the grantee to enforce its payment against the grantor and the other surety, or either of them: — Held, that the proviso restrained the operation of the release, and that the liability of the co-surety was not affected by such release.

A replication taking issue on a plea alleging that no memorial of an annuity had been inrolled, and setting forth such memorial, properly concludes with a verification by the record.

**C**OVENANT. The declaration stated that theretofore, and in the lifetime of the said *John Springall*, to wit, on the 11th of *October*, 1834, by a certain indenture then made between *John Lack* of the first part, the defendant and *Charles Parry Lack* of the second part, and the said *John Springall* of the third part — profert — the said *John Lack*, for the considerations therein mentioned, did give, grant, &c., unto *Springall*, one annuity or clear yearly sum of 37*l.* to be paid during the term of ninety-nine years, to commence, &c., if *John Lack* should so long live; to have the said annuity of 37*l.* unto *Springall*, his executors, administrators, and assigns, during the said term of ninety-nine years, to commence as aforesaid, if *John Lack* should so long live, to be paid at &c., by four equal quarterly payments, &c., in every year; that it was agreed that the defendant and the said *C. P. Lack* should respectively guarantee the payment thereof and of such proportionable part thereof as in the said indenture mentioned, and all costs, charges, and expenses to be incurred or occasioned by reason of any default in payment thereof, or of any part thereof;



in pursuance of the last-recited agreement, they the plaintiff and *C. P. Lack*, did, in and by the said indenture, bind themselves, their heirs, &c., and each of them severally for himself, his heirs, &c., covenant with *Lack*, his executors, &c., by the said indenture, that *Lack*, his heirs, &c., should make any default or default of the said annuity of 37*l.*, or any part thereof, and such proportionable part thereof as aforesaid, in that the defendant and *C. P. Lack*, their heirs, &c., or some or one of them, should and would, at or to time, immediately after any such default or default made as aforesaid, well and truly pay unto *Lack*, his executors, &c., the said annuity of 37*l.*, and arrears thereof, and such proportionable part thereof as aforesaid. Breach—that, after the making of the said indenture, and in the lifetime of the said *Lack*, who is still living, and during the said term of nine years, and after the death of *Springall*, on the 11th of *January*, 1846, a large sum of money, to wit, the sum of 74*l.*, of the said annuity, for the term of the said term then last elapsed, became due to the said *John Lack* to the plaintiffs as executors of the said *Springall*; yet the said *John Lack* had not paid the sum of 74*l.*, or any part thereof, but therein had made default, of all which the defendant had notice; yet neither of them, the defendant *Lack*, as sureties for the said *John Lack*, had paid the same, or any part thereof, and the said sum still remained in arrear, contrary to the said indenture, and the said covenant of the defendant in that

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in his plea—that, after the making of the indenture mentioned, and after the passing of 6 *Vict. c. 116.*, intituled “An act for the relief of insolvent debtors,” and before the making and passing of 8 *Vict. c. 96.*, intituled “An act to amend the

Second plea.



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law of insolvency, bankruptcy, and execution," to wit, on the 6th of *June*, 1843, a petition for protection from process was duly presented by the defendant, under and according to the provisions in that behalf of the said first-mentioned act; and that afterwards, and before the commencement of this suit, to wit, on the 14th of *August*, 1843, a final order for protection and distribution was made in the matter of the said petition under and by virtue of the said first-mentioned act, by a commissioner duly authorized in that behalf, to wit, one *R. G. C. Fane*, Esq.; and that, on a certain day before the commencement of this suit, to wit, on the 6th of *June*, 1843, the said petition was filed pursuant and according to the provisions of the said first-mentioned act — verification.

Third plea.

Third plea — that, after the making of the said indenture in the declaration mentioned, and whilst the same was in full force and virtue, and in the lifetime of *Springall* in the declaration mentioned, and before any portion of the said sum in the declaration mentioned, and claimed to be due and payable from the defendant, became due and payable, and before the commencement of this suit, to wit, on the 11th of *January*, 1844, an indenture was made between *William Thompson* of the first part, *Springall* of the second part, and *C. P. Lack*, in the declaration and in the said indenture of covenant mentioned, of the third part — profert — whereby *Springall*, for the considerations therein expressed, acquitted, released, exonerated, and for ever discharged *C. P. Lack*, in the declaration mentioned, of and from the payment of the said annuity or yearly sum of 37*l.* in the said indenture of covenant in the declaration mentioned, granted, and of and from the performance of the joint and several covenants therein contained in the said indenture of covenant in the declaration mentioned, on the part of the said *C. P. Lack*, and from all claims and demands of *Springall*, deceased, against the



said *C. P. Lack* in respect thereof; and that the said indenture of release, and the release therein contained, and thereby made, were made without the consent or knowledge and against the will of the defendant — verification.

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Last plea — that the said indenture in the introductory part of this plea mentioned, was made after the passing of an act made, &c. (53 G. 3. c. 141.), intituled “An act to repeal an act of the seventeenth year of the reign of His present Majesty, intituled ‘An act for registering the grants of life annuities, and for the better protection of infants against such grants,’ and to substitute other provisions in lieu thereof;” that the said annuity was granted for a pecuniary consideration; that no memorial of the said indenture was inrolled in the high court of Chancery according to the provisions of the said act of parliament; and that thereby the said indenture was null and void — verification.

Last plea.

Special demurrer to the second plea, assigning, among other causes, that the said plea does not shew that the petition in the said plea mentioned, was presented, or that the order in the said plea mentioned, was made, after the accruing of the cause of action in the declaration mentioned; and that the said plea does not shew that the cause of action in the declaration mentioned, was a debt contracted before the date of filing the said petition.

Demurrer to second plea.

Joinder in demurrer.

The plaintiffs prayed that the indenture might be inrolled; by which indenture — after reciting the grant of an annuity of 27*l.* to one *William Thompson*, and the grant of the annuity in question, and that *E. J. Lack* (the defendant) and *J. Lack* had made default in payment of the said annuities, and that *C. P. Lack* had paid up all arrears of *Thompson's* annuity to the 18th of *December* then last, and of the annuity in question to the date of those pre-

Demurrer to third plea.



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sents; and also reciting that *C. P. Lack* had applied to *Thompson* and *Springall* to release him from his covenants respectively contained in the said indentures of grant of annuity, and all claim and demand of them the said *Thompson* and *Springall* respectively against him in respect thereof, on payment by the said *C. P. Lack* unto *Thompson* and *Springall* of 259*l.* 5*s.*, which they had agreed to do, subject, nevertheless, and without prejudice, to the respective rights of *Thompson* and *Springall*, to enforce the payment of their said several annuities as against *E. J. Lack* and *John Lack*: — it was witnessed, that, in consideration of 259*l.* 5*s.* to *Thompson* and *Springall* paid by *C. P. Lack*, *Thompson* (as to and concerning only the said annuity of 27*l.*) did remise, release, &c., and *Springall* (as to and concerning only the said annuity of 37*l.*), did remise, release, &c. *C. P. Lack*, his heirs, &c., from the payment of the said several annuities or yearly sums of 27*l.* and 37*l.* by the said therein-before in part recited indentures of grant of annuity granted, and of and from the performance of the joint and several covenants contained in the said several indentures, or in either of them, on the part of the said *C. P. Lack*, his heirs, executors, &c. and from all claims and demands of them, *Thompson* and *Springall* respectively, and their several and respective heirs, &c., against him in respect thereof: Provided always, nevertheless, and it was thereby agreed between the said parties, that nothing therein contained should extend, or be construed to extend, to, or prejudice, the respective rights of the said *Thompson* and *Springall*, and their respective executors, administrators, and assigns, to enforce the payment of the said several annuities of 27*l.* and 37*l.* respectively, as against the said *E. J. Lack*, and *John Lack*, or either of them, their or either of their heirs, executors, &c.



The plaintiffs then demurred generally to the third plea.

Joinder in demurrer. (a)

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Replication to the last plea — that a memorial of the indenture in the declaration mentioned, was, within thirty days after the execution thereof, to wit, on &c., duly inrolled in the high court of Chancery, according to the provisions of the statute, and that such memorial was as follows, to wit [setting out the memorial]; as by the said memorial, remaining of record duly inrolled in the said high court of Chancery, more fully appeared: that the said memorial did and doth duly contain and set forth the day of the month and the year when the indenture in the declaration mentioned bore date, and the names of all the parties and of all witnesses thereto, and of the person for whose life the said annuity was granted, and of the person by whom the same was to be beneficially received, and of the pecuniary consideration for granting the same, and how such consideration was paid, and the amount of the annual sum to be paid, — in the form and to the effect as in and by the said statute in that case made and provided is required; as by the said inrolment of the said memorial, remaining of record in the said high court of Chancery, more fully appears: and that this the plaintiffs were ready to verify by the said record.

Special demurrer to this replication, assigning for causes — that the said replication concludes improperly, and that it ought to have concluded to the country; that

(a) The following points were marked for argument on the part of the plaintiffs:—

“A matter of law intended to be argued in support of the demurrer, is, that the deed in question does not operate, in point of law, to discharge the defendant from his covenant.

“The plaintiffs will contend that the deed by which their testator covenanted not to sue the defendant's co-surety, but expressly reserved the liability of the principal and the defendant, did not operate as a release of the defendant from his covenant.”



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the said replication is neither a traverse nor a pleading in confession and avoidance of the matters of the said last plea; and that the said memorial in the said replication set forth is not a sufficient memorial, nor such as is required to be inrolled, according to the provisions of the act in such case made and provided, &c.

Joinder in demurrer.

*Dowling*, Serjt., for the plaintiffs. The objection to the second plea is, that it does not allege that the cause of action accrued before the presenting of the petition by the defendant to the insolvent court. The words of the 5 & 6 *Vict. c. 116. s. 10.* are, "if any suit or action is brought against any petitioner for or in respect of any debt *contracted before* the date of filing his petition, it shall be a sufficient plea in bar of the said suit or action, that such petition was duly presented, and a final order for protection and distribution made by a commissioner duly authorized; whereof the production of the order signed by the commissioner, with proof of his handwriting, shall be sufficient evidence." Consequently, the discharge can only operate where the debt was contracted before the filing of the petition. The point arose in this court in a case of *Wilkes v. Hopkins (a)*, when no one appeared to support a similar plea to the present, and judgment was given for the plaintiff.

With respect to the third plea, the answer attempted to be thereby set up, is, a release to a co-surety of the defendant. It must be admitted that, generally speaking, where a release is given to one, it will operate as a discharge to all. But here, the proviso annexed to the release prevents the discharge of the defendant. The effect of such proviso is, to limit the release to *C. P. Lack* alone, and to leave *J. Lack* and the defendant subject to the same liability as before. In the older authorities, it seems to

(a) *H. T.* 1845. Not reported.



have been considered that a release is so powerful that nothing could affect or restrain its operation; but the more recent cases look to the intention of the parties. Lord Cote, commenting upon a section in *Littleton* (a), says: "Here, by this section, it is to be understood, that when divers doe a trespasse, the same is joynt or severalle at the wil of him to whom the wronge is done, yet, if he release to one of them, all are discharged; because his own deed shall be taken most strongly against himself." But, where a release was given by the plaintiffs to A., one of two partners, with a proviso that it should not prejudice any claims which the plaintiffs might have against B., the other partner; and that, in order to enforce the claims against B., it should be lawful for the plaintiffs to sue A. either jointly with B. or separately; and, in an action against A. and B., this release having been pleaded by A., and set out on oyer in the replication, with an averment that the action was prosecuted against A. jointly with B. for the purpose of enabling the plaintiffs to recover moneys due to them from B. and A., either out of the joint estate of B. and A., or from B. or his separate estate; the court, in effect, held that the action might be maintained, by overruling a demurrer to the replication: *Solly v. Forbes*. (b) *Cocks v. Nash* (c) is also in point. [Williams, J. Did not that case turn entirely on the point whether you could vary a deed by parol?] It shews that the intention of the parties is to be looked at, and not the mere words of the release. *Payler v. Homersham* (d) also establishes that the general words of a release may be restrained by a particular recital. So, in the present case, the pro-

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(a) *Co. Litt.* 232. a.(c) 9 *Bingh.* 341., 4 *M. &*

(b) 2 *Bro. & B.* 38. As to  
the principle of this decision,  
see *Price v. Edmunds*, 5 *M. &*  
*R.* 292 (a).

*So.* 162.(d) 4 *M. & S.* 423.



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viso must be incorporated with the release, and the whole read together.

With respect to the replication to the last plea; the first cause of demurrer is, that it should have concluded to the country. *Richardson v. Tomkies* (a) is an express authority that it ought to conclude with a verification by the record. In *Hickes v. Cracknell* (b), also, the same conclusion was adopted.

The second objection is, that the replication is neither in denial, nor in confession and avoidance, of the matters stated in the plea; but the two cases last cited shew that the replication is in the usual form. The plaintiffs are not prejudiced, as it enables them to take any objection to the memorial: *Veale v. Warner*. (c) *Fisher v. Pimbley* (d) shews the principle on which this particular mode of pleading depends, is, that it affords an opportunity to the defendant to avoid the validity of the memorial.

The third objection is, that the memorial is not sufficient. [*Channell*, Serjt. No point will be made of that.]

*Channell*, Serjt., for the defendants. The second plea, which sets up a discharge by operation of law, is founded not only upon the 5 & 6 *Vict. c. 116. s. 10.* and other sections of that statute, but also on the 7 & 8 *Vict. c. 96. s. 25.* It is objected, that the plea does not allege that the proceedings in the insolvent court took place after the cause of action accrued. It may be that this particular debt did not arise till after the petition was filed; but it is submitted that there is a difference between a cause of action in respect of goods, and one by reason of a covenant; and, here, the plea states, that, after the making of the indenture, the defendant petitioned the court. It is submitted that the 5 & 6 *Vict. c. 116.*

(a) 9 *Bingh.* 51., 4 *M. & Sc.* 56.

(b) 3 *M. & W.* 72.

(c) 1 *Wms. Saurd.* 6th edit. 326 b., note (A).

(d) 11 *East*, 188.



alone discharges the defendant's covenant. But the defendant also relies on the 7 & 8 *Vict. c. 96.* [*Maule, J.* The petition was before the passing of that act; how can it derive any operation from that statute?] The 25th section says: "that every sum of money which shall be payable by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever, *shall* be deemed and taken to be debts within the meaning of the said recited act (5 & 6 *Vict. c. 116.*) and of this act." The latter act is explanatory of the former, and the foregoing clause is to be construed the same as if it had been contained in the 5 & 6 *Vict. c. 116.* [*Maule, J.* The clause does not say, "shall be deemed and taken *to have been* debts," but "*to be* debts." To give the 7 & 8 *Vict. c. 96. s. 25.* a retrospective operation, very strong words ought to have been used.] Unless the section can be treated as declaratory, and as having a retrospective operation, the second plea cannot be supported, after the decision of this court in *Wilkes v. Hopkins.*

With respect to the third plea, it is clear that a release to one of two covenantors, although the covenant, as here, is joint and several, is a release to both: 2 *Wms. Saund.* 47 gg, note (1). (a) The principle is further established by *Cheetham v. Ward* (b) and *Nicholson v. Revill* (c), and the ground of it is, that the debt is thereby *extinguished.* [*Maule, J.* If that principle be the correct one, then a release to one of two parties *severally* bound only, would be a release to both. It is only when they are also jointly bound that the reason given in *Co. Litt. 232. a.* applies; for, where one is released from his joint liability, the other is released from his; and

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(a) 6th ed. Note to *Fowell v. Forrest* (citing *Clayton v. Kynaston*, 2 *Salk.* 573., 2 *Roll. Abr.* 412 (G.), pl. 4, 5.) And see 2 *Wms. Saund.* 6th edit., p. 47 gg., n. (d); 18 *Vin. Abr.* 352.  
(b) 1 *Bos. & P.* 630.  
(c) 4 *A. & E.* 675.; 6 *N. & M.* 192.



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the latter, being released from his joint liability, is also released from his several liability. The question is, whether you cannot release the joint liability, and except from the release the several liability.] Undoubtedly the authority of *Solly v. Forbes* was recognised by Lord Eldon in *Ex parte Gifford*. (a) But, in *Nicholson v. Revill*, the court of King's Bench declare their dissent from the expressions used in *Ex parte Gifford*, which, they say, "seem to lay it down that a joint-debtee (b) might release one of his debtors; and yet, by using some language of reservation in the agreement between himself and such debtor, keep his remedy entire against the others, even without consulting them." [Maule, J. It does not appear that the attention of the court of King's Bench was called to *Solly v. Forbes*. Do you say, that, where there is a joint and several liability, it is impossible to release the one without releasing the other?] It is necessary in this case so to contend. [Maule, J. That is opposed to the authorities.] With regard to the replication to the last plea, it is difficult to distinguish this case from *Richardson v. Tomkies*.

WILDE, C. J. The first point for our consideration arises upon the demurrer to the plea which sets up the discharge of the defendant under the insolvent debtors act; and the objection taken is, that such discharge was subsequent to the accruing of the cause of action. The general rule, undoubtedly, is, that the capability of the creditor to take the advantage conferred by the act, must be co-extensive with the relief afforded to the debtor. The objection, however, that the plea does not allege that the plaintiffs were in a situation to take advantage of the act, or, in other words, that their demand accrued prior to the defendant's discharge, is met by an admission,

(a) 6 Ves. jun., 805.

(b) The term "joint-debtee" is here used to designate a

debtee of joint-debtors, not, according to its more usual acceptation, a co-debtee.



that, if the case stood on the 5 & 6 *Vict. c. 116.* alone, the objection would be well founded. But that statute, it is said, is expanded by the 7 & 8 *Vict. c. 96.*, which is to be considered as declaratory of it, and that, by the latter act, the covenant in question placed the plaintiffs in a position to turn the contract into a debt valued and proved. The general principle, however, that a statute is not to be construed so as to have a retrospective operation, is a just one; for, persons ought not to have their rights affected by laws passed subsequently. And, to decide that the 7 & 8 *Vict. c. 96.* has relation to a bygone transaction, would be to hold, that, at any period after the insolvent's estate had been distributed among the other creditors, a party might be told that he was to be entitled to no other remedy than his share of such exhausted fund; which would give to the statute a most unjust operation. In order to give a retrospective effect to any statute, the words should be very clear. In this case, it appears to me that the reasonable construction of the 8 & 9 *Vict.* is, that it applies to future transactions only. I think, therefore, that the second plea is bad, in not shewing that the defendant obtained his discharge subsequently to the accruing of the cause of action.

With respect to the third plea, the question is, what is the effect of the deed which is therein described as a release? Are you at liberty to separate that which professes to be a release, from the proviso? or must you take them both together, and say what is their entire effect? It seems to me, that you must look at the whole of the deed; and that raises the point, whether a party may give a qualified release. *Solly v. Forbes* is a decision that you may give such a release; and, although in *Nicholson v. Revill* there are to be found expressions used by Lord Denman, in delivering the judgment of the court, inconsistent with that view, it seems to me that those expressions are more of the nature of *obiter dicta* than those attributed to Lord

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*Eldon* in *Ex parte Gifford*. In the latter case, Lord *Eldon* decided, in conformity with the principle established by *Solly v. Forbes*,—which I consider is a decisive authority,—that a release may be qualified, and prevented operating as a discharge of a co-surety. (a) The question here is, whether the release in this deed is qualified, and reserves the remedy against the defendant. It is admitted that the intention of the parties is clear; and strong grounds should be laid before the court to induce it not to give effect to the deed according to such intention. I see nothing in the present case to prevent us from deciding in conformity with *Solly v. Forbes*. Generally speaking, a release of one, will operate as a discharge to all. Therefore, in *Nicholson v. Revill*, the plaintiff having received a sum of money from one of the parties to a promissory note, and having erased his name from the instrument, it was held, that such erasure operated as a release to the other parties thereto; and what was necessary for the decision of that case, was in accordance with the general principle. I am of opinion that this was a qualified release, and did not discharge the co-surety. I think, therefore, the general demurrer sustainable by the deed as set out on oyer.

As regards the demurrer to the replication to the last plea, the plaintiff sets out the memorial, and concludes with a verification *per recordum*. That is within *Richardson v. Tomkies*; and it is also correct in principle.

Our judgment, consequently, must be for the plaintiff on the whole record.

(a) A similar distinction prevails in the Roman law: — “In his qui ejusdem pecuniæ exactionem habent in solidum, vel qui ejusdem pecuniæ debitores sunt, quatenus alii quoque prosit aut noceat pacti exceptio, queritur: et in rem pacta omnibus prosunt quorum obli-

gationem dissolutam esse ejus qui paciscebatur interfuit: itaque debitoris conventio, fidejussoribus proficiet.” “Nisi hoc actum est *Ut dumtaxat a re non petatur, a fidejussoribus petatur*: tunc enim fidejussor exceptione non utetur.” *Dig. lib. 2., tit. 14., l. 21. § 5. l. 22.*



COLTMAN, J. It appears to me that a retrospective effect cannot be given to the 7 & 8 *Vict. c. 96.*, and, consequently, that the second plea is bad.

With respect to the plea setting up a release, it is argued that the proviso is to be regarded as repugnant, and therefore void. That, however, is not the way in which the question is to be considered; but the whole of the deed should be looked at in order to see the intention of the parties; which admits of no doubt.

As to the demurrer to the replication to the last plea, the case of *Richardson v. Tomkies* is precisely in point.

MAULE, J. The second plea is objected to, because it relies on a discharge under the 5 & 6 *Vict. c. 116.*, and does not shew that the debt accrued before the filing of the defendant's petition. The answer attempted is, that the 7 & 8 *Vict. c. 96.* is to be construed as having a retrospective effect, and that this case falls within it. In the course of the argument, I intimated my opinion that no such operation could be given to the latter statute.

The question as to the third plea turns on the construction of the deed, which releases *C. P. Lack*, but provides "that nothing therein contained shall extend to prejudice the rights of *Thompson* and *Springall* to enforce the payment of the annuities as against the defendant." Now, inasmuch as it is possible to give operation to both clauses without prejudicing the defendant, or increasing his liability, I think that construction is to be adopted which will leave the plaintiffs their remedy against the defendant, and, consequently, that this plea also is bad.

The last plea has the proper verification and conclusion.

WILLIAMS, J., concurred.

Judgment for the plaintiffs.

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## MAUNDER v. COLLETT.

A defendant, who has obtained an order for particulars of the plaintiff's demand, with a stay of proceedings until they are delivered, may waive the delivery of such particulars, and plead or demur to the declaration.

**D**OWLING, Serjt., had obtained a rule calling on the defendant to shew cause why the demurrer and plea which had been delivered in this case, should not be set aside, with costs. It appeared by the affidavits, that the defendant's attorney, on the 27th of *October* last, had obtained from *Coltman*, J., at chambers, an order for particulars of the plaintiff's demand, with a stay of proceedings in the meantime; which order was drawn up and served that day on the attorney for the plaintiff. No specific time for the delivery of the particulars was mentioned in the order. On the 7th of *November* the defendant's attorney served a notice on the plaintiff, stating that he waived the delivery of the particulars of demand, and at the same time delivered the demurrer and plea in question. He cited *Wickens v. Cor.* (a)

*Pashley* now shewed cause. The presumed ground on which it is attempted to set aside the proceedings as irregular, is, that the defendant should have obtained another order to rescind that which he had obtained for the delivery of particulars of demand. There are two cases which apparently form the foundation for the application. In *Burgess v. Swain* (b) it was held that the defendant, having obtained a judge's order for delivery of particulars of the plaintiff's demand, and for staying proceedings in the meantime, could not sign judgment of *non-pros* against the plaintiff for not declaring. That case is obviously distinguishable from the present; for, here the waiver of the particulars by the defendant, tends to faci-

(a) 4 *M. & W.* 67., 6 *Dowl.*  
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(b) 7 *B. & C.* 485.



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itate, and not to put a stop to the plaintiff's proceedings. *Wickens v. Cox* seems to have been decided on the ground that the notice of waiver was not given before, but was contemporaneous with, the demand of declaration. There, a defendant, after obtaining a similar order for particulars, served a demand of declaration, at the bottom of which was a notice that he had abandoned the order; and it was held this was irregular, and that he ought to have got rid of the order for particulars before the demand of declaration; and the court set aside a judgment of *non-pros* which had been signed for want of a declaration. The court is, therefore, at liberty to decide this case on principle. A defendant who obtains an order for information may, if he finds that he can dispense with such information, waive the order. [Maule, J. Is any thing said in *Wickens v. Cox* about costs? It may be that a defendant will not be allowed to waive an order for particulars of demand where the other side has incurred expense in preparing them.] It is laid down in 22 *Vin. Abr.* tit. *Waiver*, pl. 3., that a defendant may waive his plea to the writ, and plead to the action. [Wilde, C. J. Is that law now? Can you now waive a dilatory plea? I think the plaintiff might sign judgment.] The citation from *Viner* shews the general principle. So a party may abandon a rule for a new trial, or for security for costs: so, overseers may abandon an order of justices, though under hand and seal: *The King v. Inhabitants of Diddlebury* (a); *The Queen v. Inhabitants of St. Pancras*. (b)

*Dowling*, Serjt., *contra*. By rule *H. T. 2 Will. 4. r. 46. (c)*, "the defendant shall not be at liberty to waive his plea, without leave of the court or a judge." Here,

(a) 12 *East*, 359.  
(b) 3 *Q. B.* 347.

(c) 3 *B. & Ad.* 380., 8 *Bingh.* 294., 1 *M. & Sc.* 421.



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the defendant has thought proper to draw up his order for particulars, with a stay of proceedings until they were delivered; and he cannot be permitted to rescind that order of his own will. In *Wickens v. Cox*, Parke, B., says: "This is an order which is absolute at the time for a stay of proceedings; and the question is, whether it can be got rid of without an instrument of equal force and authority." And, again: "The defendant might get rid of the order by obtaining a summons and a judge's order:" and, in giving judgment, he says: "The order for particulars should have been disposed of before the demand of declaration was given." [*Wilde*, C. J. What can be the use of putting the defendant to the expense of obtaining a summons and order to rescind? *Maule*, J. In the last case, *Parke*, B., assumes that the order restrains the defendant. The plaintiff cannot proceed, or compel the defendant to go on, till he has complied with the order. But it does not follow that both the plaintiff and the defendant shall at all events be restrained from proceeding. The defendant may go on if he pleases: the plaintiff not till he complies with the order.] The question still is, whether the defendant can go on without obtaining an order to rescind the former one. [*Maule*, J. If the meaning of the first order be that which I have supposed, the defendant need not go to a judge for another order to allow him to proceed.]

WILDE, C. J. The order obviously means that the plaintiff shall be restrained, and not the defendant. It is idle to say that the defendant cannot waive an order, or take any step in the cause, without obtaining a fresh order to rescind it.

*Per curiam*,

Rule discharged, with costs.



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dem. BENJAMIN GOODYEAR BLOMFIELD v.  
The Reverend CHARLES EYRE, Clerk.

Nov. 23.

THIS was an action of ejectment, which came on for trial before *Coleridge*, J., at the summer assizes for the county of *Essex*, in 1845, when a verdict was found for the plaintiff, subject to the opinion of the court on the points stated in the following case:—

Before and at the time of the surrender to uses hereafter mentioned, *Mary Sida* was seised in her demesne of fee, at the will of the lord of the manor of *Over-*

to the use of *A.* until the solemnization of the marriage: and, from and after the marriage, to the use of *B.* for life; and, after his decease, to *A.* and her assigns for life; and, after her decease, to the use of such child and children of the body of *A.* by *B.* to be begotten, and for such estate, &c., charged with any sum or sums for any other of their children, as *A.* should by deed or will devise, or appoint, &c., and, in default of appointment, to the use of all children of the marriage, in equal shares; and, in default or failure of such issue, then, from and after the decease of *B.*, to the use of *A.*, her heirs and assigns for ever.

The marriage took place, and two sons having been born, *A.*, by a will, relating to the power, gave, devised, and appointed the premises to her eldest son and his heirs and assigns for ever, from and after the decease of *B.*, upon condition that he should pay to his brother *D.*, the second son, 200*l.*, within one year after the decease of *B.*, or on *D.* attaining the age of twenty-one. The will proceeded—“but, in case it shall happen that neither of my sons shall be living at the decease of *B.*, then I do give, devise, direct, and appoint, the said copyhold messuage, &c., unto *E.* (the father of *B.*), his heirs and assigns,” in trust for sale.

Subsequently to the date of the will, there were four other children born of the marriage. *A.* died without altering her will. *C.* and *D.* died before their father *B.*:—

that the appointment by *A.* was not void by reason of its having been made by her during coverture, notwithstanding the original surrender contained a dispensation with the disability arising from coverture.

It was held, that the appointment was void, by reason of the subsequent limitation to *E.*, the grandfather; for, that the estate or interest given to *C.*, the son, under the former part of the will, was not less subject to be defeated in consequence of the gift over being to a person incapable of taking, than if it had been given to a person who was properly an object of the power.

*A.* being seised of copyhold lands, in contemplation of her marriage with *B.*, surrendered the same, to the intent that the lord might re-grant the



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*hall* and *Netherhall* in the county of *Essex*, according to the custom of the said manor, of the tenements, with the appurtenances, in the declaration mentioned, the same then and still being part and parcel of the same manor, and a customary tenement thereof, demised and demisable by copy of the court-rolls of the said manor, by the lord of the said manor, or by his steward of the court of the said manor for the time being, to any person or persons willing to take the same, in fee-simple, or otherwise, to hold of the lord of the said manor, at the will of the lord, according to the custom of the said manor.

By the immemorial custom of the manor, the youngest son of any person dying seised of any descendible estate in any of the copyhold tenements thereof, is the customary heir of his *father*, and succeeds, as such heir, to the tenements of which his father dies seised.

*Mary Sida*, being so seised and in possession of the said customary tenements, with the appurtenances, did, on the 2nd of *August*, 1764, by the rod, duly surrender out of her hands into the hands of the lord of the said manor, by the hands and acceptance of *William Chaplin*, gentleman, in the place of the lord's bailiff, and in the presence of *D. Sida* and *J. Blomfield* the elder, two copyhold or customary tenants in the manor, they witnessing the same according to the custom of the manor, the said tenements, with the appurtenances, to the intent that the lord should thereupon re-grant all and every the said surrendered messuage, lands, tenements, hereditaments, and premises, with their appurtenances, to and for the several uses and purposes hereinbefore mentioned and expressed of and concerning the same, that is to say, to the use and behoof of the said *Mary Sida*, her heirs and assigns, until a marriage intended should be had and solemnized between her the said *Mary Sida* and *John Blomfield* the younger; and, from



and after the solemnization of the said intended marriage between the said *John Blomfield* the younger and *Mary Sida*, then to the use of the said *John Blomfield* for and during his lifetime; and, from and after his decease, to the use of the said *Mary Sida*, his intended wife, and her assigns, for and during her lifetime; and, from and after her decease, *to the use of such child or children of the body of the said Mary by the body of the said John Blomfield, her said intended husband, to be begotten, and for such estate or estates, or other interest, and in such parts, shares, and proportions, manner and form, charged and chargeable with any sum or sums of money for any other of their children, as she the said Mary, by any deed or deeds, writing or writings, to be by her sealed and delivered in the presence of, and attested by, two or more witnesses, or by her last will and testament in writing, to be by her signed, sealed, and published, as such, in the presence of and attested by three or more witnesses, shall or may limit, declare, devise, direct, or appoint; and, for want of such limitation, declaration, devise, direction, or appointment, and until such limitation or declaration, devise, direction, or appointment shall be so made and executed, and the estate or estates, or other interest, to be raised and created thereby as aforesaid, shall respectively commence and take effect, to the use of all and every the children, or of the child, if but one, of the body of the said Mary, by the body of the said John Blomfield, her said intended husband, to be begotten, in equal shares and proportions (if more than one such child), and to take as tenants in common, and not as joint-tenants, and of the heirs of the several and respective bodies of such children lawfully issuing; and, if there should be but one such child, to the use of such only child, and the heirs of his or her body lawfully issuing; and, for want and in default or failure of such children, or of one such child of the*

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body of the said *Mary*, by the body of the said *John Blomfield*, her said intended husband, so to be begotten then, and from and after the decease of him the said *John Blomfield*, to the use and behoof of the said *Mary* his said intended wife, and of her heirs and assigns, for ever, and to or for none other use, intent, or purpose whatsoever.

On the 9th of *August*, 1764, the said *Mary Sida* intermarried with the said *John Blomfield*; and *John Blomfield* and *Mary* his wife continued from thence during their respective lifetimes, and *John Blomfield* until his death, in possession of the premises, with the appurtenances.

On the 30th of *May*, 1765, the said surrender to uses was duly presented by the homage, at a court of the lord of the manor, according to the custom thereof. On the 11th of *November*, 1765, *John Blomfield*, the eldest child of the marriage, and the father of the lessor of the plaintiff, was born.

On the 14th of *November*, 1766, *William Blomfield*, the second child of the marriage, being the *William Blomfield* mentioned in the will hereinafter mentioned, was born.

On the 5th of *January*, 1767, there being then no other children of the marriage save as aforesaid, *Mary Sida* made her last will and testament in writing, which was signed, sealed, and published by her as such will and testament, in the presence of and attested by three credible witnesses; which will was as follows:—

Appointment. “ I, *Mary Blomfield*, wife of *John Blomfield* the younger, of *Dedham*, in the county of *Essex*, according to and in pursuance of the power reserved to me the said *Mary* in and by a certain surrender of the manors of *Overhall* and *Netherhall*, in *Dedham*, dated the 2nd of *August*, 1764, made and passed by me the said *Mary* by the name of *Mary Sida*, spinster, upon my then



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intended marriage with the said *John Blomfield*, of all that messuage or tenement called *Southfield* house, and twelve acres of land and pasture, more or less, thereunto belonging, with the appurtenances, in *Dedham* aforesaid, and held by copy of court-roll of the said manor, and also of all other the lands and tenements of me the said *Mary* then held by copy of court-roll of the same manor, with the appurtenances: Now, as concerning the said copyhold premises, with their appurtenances, accordingly, I, the said *Mary Blomfield*, do hereby make, publish, and declare this my last will and testament, in the manner following, that is to say, I give, devise, direct, and appoint, all and singular the aforesaid copyhold messuage, lands, tenements, meadows, pastures, hereditaments, and premises, with their appurtenances, unto my son *John Blomfield*, and to his heirs and assigns for ever, from and after the decease of my husband, *John Blomfield*, as aforesaid: but, nevertheless, upon this condition, that the said *John Blomfield* shall pay to my other son, *William Blomfield*, the sum of 200*l.* of lawful money of *Great Britain*, within one year and a day after the decease of my husband, *John Blomfield* aforesaid, in case that my son *William Blomfield* be then living and twenty-one years; but, if he should then be under the age of twenty-one years, then my will is, that the above said 200*l.* shall be paid him by my son *John* as soon as he comes to the age of twenty-one years: But, in case it shall happen that neither of my sons aforesaid shall be living at the decease of the said *John Blomfield*, my husband, then, and in that case happening, I do, by this my will, give, devise, direct, and appoint all and every the aforesaid copyhold messuage, lands, tenements, meadows, pastures, hereditaments, and premises, with their appurtenances, unto my father-in-law *John Blomfield*, the elder, of *Dedham*, in the county of *Essex*, his heirs and



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assigns, in trust, nevertheless, and to the intent and purpose, that the said *John Blomfield* the elder, his heirs and assigns (as soon as may be after the decease of the said *John Blomfield*, my husband), shall absolutely sell and dispose of all and singular the aforesaid copyhold messuage, lands, and tenements, meadows, pasture hereditaments, and premises, with their appurtenances and surrender or cause the same to be surrendered unto any person or persons, and their heirs for ever, who shall be willing to purchase the same premises, with their appurtenances, at and for a valuable price or consideration or purchase-money for the same premises; and I will, order, give, direct, and appoint such purchase-money, so to be made and arise upon the absolute sale of the premises as aforesaid, to be applied and paid unto the several persons, and in the manner next hereinafter mentioned, that is to say, to my aunt *Mrs. Frances Holman* the sum of 50*l.*, part of the purchase-money; to my uncle *Mr. William Chaplin*, the sum of 50*l.*, more part thereof; to my cousin *Richard Chaplin* (son of the said *William Chaplin*) the sum of 50*l.*, more part thereof; to my cousin *Chaplin Holman*, the sum of 50*l.*, more part thereof; to my mother-in-law *Mrs. Jane Blomfield*, the sum of 50*l.*, more part thereof; to *Mrs. Mary Blomfield*, *Mrs. Sarah Blomfield*, *Mrs. Jane Blomfield*, *Mrs. Hannah Blomfield*, and *Mrs. Rebecca Blomfield*, the five sisters of the said *John Blomfield*, my husband, to each and every one of them the sum of 50*l.*, more part thereof: And, as to the residue and remainder of such purchase-money to arise and be made upon sale of the said copyhold premises as aforesaid, I give, devise, bequeath, direct, and appoint the same unto my said father-in-law *John Blomfield* the elder, and to his use and disposal. And I, the said *Mary Blomfield*, do hereby ratify and confirm this to be my last will and testament as concerning the above copyhold premises so by me surren-



dered as above mentioned, with the intent that the lord of the manor above said shall regrant the same premises, with their appurtenances, as directed and appointed by this my said will and testament. Also, I give and bequeath all that my estate which came to me by the death of my late uncle Mr. *Daniel Sida*, to my beloved husband *John Blomfield*, to his heirs and assigns, for ever. In witness," &c.

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The surrender in the said will mentioned, of the 2nd of *August* 1764, and the property therein also first mentioned, were and are the surrender to uses hereinbefore mentioned, and the premises in the declaration mentioned. The estate in the said will mentioned as having come to *Mary Blomfield* by the death of her said uncle *Daniel Sida*, is another and different property.

On the 16th of *March*, 1767, the said *John Blomfield* and *Mary*, his wife, were, at a court of the lord of the manor, according to the custom thereof, duly admitted to the said customary tenements, with the appurtenances, pursuant to the said surrender to uses, of the 2nd of *August*, 1764, to hold the same to the uses and in the manner mentioned in the said surrender.

On the 6th of *July*, 1767, *William Blomfield*, the second son of the said marriage, died.

There were afterwards five other children of the marriage, namely, *William* (the second of that name), *Mary*, *Samuel*, *Henry*, and *Sarah*, some of whom are still living.

On the 19th of *June*, 1782, *Mary Blomfield* died, without revoking or altering her said will.

On the 27th of *December*, 1782, administration with the will annexed was duly granted to *John Blomfield*, the husband of *Mary Blomfield*.

On the 3rd of *February*, 1801, *John Blomfield* the younger, the eldest son of the said *John* and *Mary*, was, at a court of the lord of the said manor, admitted,



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according to the custom of the manor, to the reversion or remainder in fee immediately expectant on the death of *John Blomfield*, his father, in and to the aforesaid premises, to hold to him the said *John Blomfield* the son, his heirs and assigns, immediately from and after the decease of *John Blomfield* the father, pursuant to the said surrender and will of *Mary Blomfield*, his mother, deceased.

On the 26th of *June*, 1814, *John Blomfield* the younger, intermarried with *Elizabeth Goodyear*, the mother of the lessor of the plaintiff. On the 18th of *July*, 1820, *Benjamin Goodyear Blomfield*, the lessor of the plaintiff, was born, and was the youngest son of the said *John Blomfield* the younger.

On the 20th of *July*, 1820, *John Blomfield* the younger, the son of the said *Mary*, the testatrix, and the father of the lessor of the plaintiff, died intestate, in the lifetime of his father, *John*, the husband of the said *Mary*, leaving the lessor of the plaintiff, his youngest son and customary heir by the immemorial custom of the said manor, him surviving.

On the 6th of *September*, 1820, *John Bloomfield*, the husband of the said *Mary*, and grandfather of the lessor of the plaintiff, died, having been; until his death, in possession of the premises. After the death of *John Blomfield*, the husband of the said *Mary*, and on the 21st of *February*, 1821, at a court-baron then held for the said manor, the homage presented the said surrender of the 2nd of *August*, 1764, and the marriage of the said *Mary Sida* and *John Blomfield*; and that there was issue of the said marriage six children, to wit, the said *John*, *William*, *Mary*, *Samuel*, *Henry*, and *Sarah*; and that the said *Mary Blomfield* (formerly *Mary Sida*) died in the lifetime of her husband, without having made any appointment or disposition, by deed or will, of the said premises, leaving six children



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her surviving; and that *John* and *Henry*, two of the said children, had died in the lifetime of *John Blomfield*, their father; and that, on the 1st of *November* then last, at a court then held, the death of *John Blomfield*, the father, had been presented, and the first proclamation made, and, at another court, held on the 1st of *December* then last, the second proclamation had been made.

The case then stated the admittance, at the same court, of *William Blomfield*, *May Fitch*, *Samuel Blomfield*, and *Sarah Rouse* (sons and daughters of *John Blomfield* and *Mary* his wife), and also of *Mary Blomfield* (daughter of *Henry Blomfield*, deceased), respectively, to one sixth of the premises, pursuant to the surrender of the 2nd of *August*, 1764.

Between the months of *February*, 1821, and *March*, 1823, *Mary Blomfield*, the only child and heiress-at-law of *Henry Blomfield* (the son), married one *Kidd*, and afterwards, and before *March*, 1823, died without leaving issue.

At a court holden for the manor, on the 18th of *March*, 1823, the homage presented the admission (as above) of *Mary Kidd*, late *Mary Blomfield* (the daughter of *Henry Blomfield*), and her death; and thereupon *Samuel Blomfield*, youngest son and heir-at-law of *John* and *Mary Blomfield*, formerly *Mary Sida*, the said *Mary Kidd* having died without issue, was admitted to one sixth part of, or share in, the said premises, to hold to him, *Samuel Blomfield*, his heirs and assigns.

In the year 1824, the present defendant purchased the interest of all the said parties in the premises, except the interest of the lessor of the plaintiff, *Benjamin Goodyear Blomfield*. On the 14th of *December*, 1824, a deed of covenant was executed [a copy of which accompanied the case]; and afterwards, on the



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14th of *December*, 1824, a surrender was made, and recovery suffered, in pursuance of the said deed of covenant; and the defendant was thereupon admitted to the premises, except the share of the said *Benjamin Goodyear Blomfield*, accordingly, to hold to him, his heirs and assigns, for ever, according to the custom of the said manor, and entered into the possession thereof, and continued in the possession or enjoyment of the same until the present ejectment was brought in the beginning of the year 1845.

There was a custom in the manor to appoint guardians. Mr. *W. C. Rouse* was appointed guardian of the lessor of the plaintiff.

In the year 1825, a lease was also granted by *Rouse*, who purported to act as the guardian of the lessor of the plaintiff, to the defendant, of the one seventh share of the lessor of the plaintiff in the premises; which lease had expired before the ejectment was brought.

The declaration in this ejectment contained two demises in the name of the said *Benjamin Goodyear Blomfield*, viz. one on the 1st of *January*, 1825, and the other on the 1st of *September*, 1841.

The defendant defended the ejectment, as landlord, for six sevenths of the property.

On the trial, lease, entry, and ouster, and possession, were admitted, as to six sevenths of the property; but the defendant's counsel contended that the lessor of the plaintiff was not entitled to recover such six sevenths on the following grounds — first, because the appointment by the said *Mary* was made in the lifetime of her husband, and the said surrender to uses of the 2nd of *August*, 1764, contained no dispensation of the coverture of the said *Mary* — secondly, that the appointment by the said *Mary* in and by her said will, was void for excess, — in attempting to benefit persons not objects of the power created by the said surrender — thirdly, that



the said *John Blomfield*, the father of the lessor of the plaintiff, was to take under the said appointment only in the event of his being alive at the death of his father, whom he did not survive; or, that any interest he would otherwise have taken, was divested or defeated by his death in his father's lifetime — lastly, that there was no surrender to the uses of the said will.

If, on all or any of the said grounds, the court are of opinion that the lessor of the plaintiff was not entitled to the said six sevenths of the property in question, the verdict for the plaintiff is to be set aside, and a verdict entered for the defendant; if otherwise, it is to stand for the plaintiff.

Any of the surrenders, admittances, or other documents mentioned in the case, are to be referred to, if necessary. The court are to be at liberty to draw any inferences from the facts stated; and, if either party shall so desire, the facts are to be stated in the form of a special verdict, which is to be entered accordingly.

*Channell*, Serjt. (with whom was *Willes*), for the plaintiff.

The first question is, whether the deed giving the power of appointment to *Mary Sida*, authorised an appointment by her *during coverture*. It is submitted that the words “notwithstanding her coverture,” or “whether covert or sole,” were not necessary; or, if necessary, that they may be inferred; for, unless the power could be exercised during coverture, it could only be available in the event of *Mrs. Blomfield's* surviving her husband; and this can hardly be said to be consistent with the intention of the parties. In *Driver d. Berry v. Thompson (a)*, it was held, that, if a copyhold be surrendered

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(a) 4 Taunt. 294.



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to such uses as a *feme covert* shall by will or codicil appoint, a paper purporting to be a will, though made by her living her husband, is a good execution. The words, the absence of which will be relied on here, were also wanting there. [*Maule*, J. But there were the words “*at any time thereafter*,” &c.] In *Sugden on Powers*(a), it is said: “It must be remarked, that, on the authority of the case of *Rich v. Beaumont* (b), it has been sometimes considered doubtful whether a power given to a *feme sole* was not suspended by her marriage. The settlement in that case was made by a single woman, and powers were given to her, to be executed by deed or will: she afterwards married, and, during her coverture, exercised the powers by will. Upon a bill filed by the appointee, to establish the execution of the power, Lord King dismissed it, on the ground that the remedy lay at law; but, upon appeal to the House of Lords, the dismissal was reversed, and the court of Chancery was directed to state a case for the opinion of the court of King’s Bench; but it has never been ascertained what ultimately became of the case. The case, however, has frequently been cited as an authority that a *feme covert* may exercise such a power. (c) In one case (d), Lord Hardwicke said: ‘It has been determined in this court that a *feme covert* can execute a power, as in *Travel v. Travel* (e) and in *Rich v. Beaumont*, where the lords sent a case to B. R. for their opinion, which they never did before;’ and, in another case, he observed that it had been disputed whether a *feme covert* could execute a power coupled with an interest, and it was held she

(a) 7th edit. p. 183.

(d) See 2 *Ves. sen.* 191.(b) 6 *Bro. C. P.* 152. 2d. ed.  
And see 4 *Fin. Abr.* 168. pl. 26., *Rich v. Beaumont*.(e) Cited 2 *Ves. sen.* 191., and reported by the name of *Sclater v. Travel*, 3 *Fin. Abr.* 427.(c) See 3 *Atk.* 711., *Downs v. Timperon*, 4 *Russ.* 334.



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it, by the House of Lords, with the advice of the  
es, in *Rich v. Beaumont*: that was a general power.  
in the case before him, he observed that the ques-  
could not arise, because the power was expressly to  
executed, whether *covert* or *sole* (a). So that he  
ed *Rich v. Beaumont* as an authority, where no *ex*-  
ion indicated that the coverture was not to be an  
acle; and this places the point upon the ground,  
of the husband's rights, but of the donor's intention;  
in another case, it is expressly stated, *arguendo* (b),  
a case was sent from the court of Chancery for the  
ion of B. R., where it was held a good appointment.  
whatever was the decision in this case, the law is  
clearly settled, that a *feme covert* may execute a  
er given to her whilst *sole*." In *Hearle v. Green*-  
(c), the question was whether an appointment by  
stant married woman was good; and Lord Hard-  
e observed: "The counsel for the plaintiffs have  
further, and insisted that a *feme covert* may exercise  
a power, and cited the case of *Rich v. Beaumont*, in  
House of Lords. *It was so determined* in the case of  
y *Travel*, before Lord Chancellor King." In the  
ent case, the surrender was of the estate of the wife;  
it would be most materially and unwarrantably  
ing down the evident intent of the surrenderor, to  
that the power could only be well executed by her  
n *sole*.

he next question is, whether the appointment is void  
xcess, in attempting to benefit persons not properly  
cts of the power. An appointment is not necessarily  
because some of its limitations are incapable of  
g supported. In *Doe d. Nicholson v. Welford* (d),  
er a power to appoint to any one or more of the

(a) 2 *Ld. Ken.* 82.(c) 3 *Atk.* 695.(b) 2 *Vez. sen.* 64.: and  
*Vez. sen.* 303. 305.(d) 12 *Ad. & E.* 61.



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appointor's *children*, an appointment to *E.*, his daughter, with limitations over to *her* daughter, was held good as to *E.*, though void as to the grandchild. So, in *Hewit v. Lord Dacre* (a), *A.*, a widow, having a power of appointing a fund amongst her children, by her will appointed shares to certain of her children for life, with remainder to their children; and, in case any of her children died in her lifetime, she gave the share to his or her issue; and, in case there should be no issue, the survivors of *A.*'s children were to take: and it was held that the appointment to the grandchildren was void, but that the alternative gift over to the surviving children, in case any died in the testatrix's lifetime without issue, was valid. The courts have always construed appointments by will more favorably than those by deed. *Adams v. Adams* (b) is also an instance of a power the execution of which was held void only so far as the excess. In *Brudenell v. Elwes* (c), the estate was settled on the husband for life, remainder to the wife for life, remainder to the children, as the husband and wife, or the survivor, should appoint; and, in default of appointment, to the first and other sons successively in tail male; remainder to the husband's right heirs. By a joint appointment, a portion of the estate was appointed to a daughter, in fee, to raise 1000*l.* for one of the sons, with a power of revocation and new appointment in the husband and wife, and the survivor, amongst the children. The wife, who survived, revoked the appointment to the daughter (but without prejudice to the payment of the 1000*l.*), and appointed new uses, some of which were void, as not being authorised by the power; and it was decided, that, subject to the estate well created by that appointment, — being successive

(a) 2 *Keen*, 622.(c) 1 *East*, 442., 7 *Fe.*(b) *Cowp.* 651.; cited 2 *Sugden on Powers*, 7th edit. p. 48. jun. 382.



life estates to the daughter and one of the sons, — the estate went, as in default of appointment, *according to the directions of the original settlement*, viz. to the sons successively in tail male, remainder to the right heirs of the father. The revocation, therefore, was held to be absolute, although the appointment was only partially valid. The master was of a contrary opinion; but the court of King's Bench certified in favour of a total revocation, and the Lord Chancellor adopted their certificate.

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It will be said that *John Blomfield* the son did not, under this appointment, take an absolute estate in fee, but only on the contingency of his surviving his father. The words "from and after the decease of my husband," do not limit the time of vesting of the estate, but refer only to the period of enjoyment. The intention of the appointor was, to benefit her son *John* and his issue, and at the same time to benefit his brother *William*. If the interest of *John Blomfield* was not a vested interest, *William* would lose his 200*l.*, unless his brother *John* survived his father. [*Maule, J.* The words are express, that, "in case it shall happen that neither of my sons aforesaid shall be living at the decease of the said *John Blomfield*, my husband," the estate shall go over.] The leaning of the courts has always been to construe estates to be vested, if it be possible: *Wrightson v. Macauley* (a). The circumstance of the husband's having a life estate here, accounts for the insertion of the words "from and after the decease of my husband." The subsequent limitations, being void, may be considered as being out of the will altogether. [*Cresswell, J.* It is difficult to say that the limitation over is to be excluded, when it is a question of construction upon the whole intent of the will.]

As to the last point, it can hardly arise; for, the in-

(a) 14 M. & W. 214.



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strument, if operative at all, operates in the nature of a will.

*Talfourd*, Serjt. (with whom was *Bovil*), for the defendant. The argument resolves itself into two points — first, whether the power in question was well executed, being executed during coverture, and there being no express dispensation with the disability of coverture — secondly, whether *John Blomfield*, the son, took a vested estate, or, if vested, whether it was not divested by his death and that of his brother *William* during the life of the father.

1. This is not the case of a power purely collateral; it is a power coupled with an interest; all the estates failing, the ultimate limitation is to the wife in fee. That distinguishes the present case from *Driver v. Berry v. Thompson*, and other cases, where it has been held that a married woman may, without express words of dispensation, exercise a power notwithstanding her coverture. The settlement provides, that, in the event of no appointment being made, the estate shall go equally amongst the children of the marriage. So long as the husband lived, there would be uncertainty as to the number of children that might result from the marriage: there is, therefore, no reason why the power of appointment should not be suspended during the coverture. It is true that Sir *E. Sugden* strongly inclines to the opinion that a power may be exercised by a married woman during coverture, though coupled with an interest. It is, however, a point upon which conveyancers are divided. Mr. *Preston* takes the contrary view. He says (a): “The opinion which prevails at present, is, that a power coupled with an interest, and vested in a married woman, may be executed by her

(a) 1 *Preston on Abstracts*, 339.



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during coverture. Lord *Hardwicke* (a) refers to the case of *Beaumont v. Rich* (b), as having decided this point. He also refers to the case of *Lady Travel*; and Mr. *Sugden*, in his valuable Essay on Powers, has quoted a long list of cases in support of a like doctrine. The case of *Lady Travel* has not been found; and the case of *Beaumont v. Rich*, instead of having decided the point, left it, as far as an opinion can be formed from the reports, in doubt: and all the other cases are instances of powers to lease; and such powers are, from their nature, to be exercised during coverture; since it is manifestly for the benefit of the married woman, and of the persons in remainder or reversion, that the property should be duly and properly tenanted. It is too much, then, to consider it to be clear, that a power given to a woman by way of interest is, without a dispensation, in terms or by circumstances, with the disability of coverture, exerciseable with effect while she is under coverture." And in *Watkins on Conveyancing* (c), it is said that "it is clearly settled, that a married woman may exercise a power simply collateral, though no special words are used to dispense with the disability of coverture; and that, if there be an express dispensation with the coverture, she may exercise powers coupled with an interest; but, with regard to powers coupled with an interest, where the coverture is not entirely dispensed with, there is no decision on the point; the prevailing opinion, however, is, that she can exercise such powers also." (d) And see the authorities collected in a note to the case of *Grange v. Fiving*. (e) There being, therefore, no case in which it has been

(a) 3 Atk. 711.

(b) *Rich v. Beaumont*, 6 Bro. P. C. 152. 2d edition.

(c) 9th edit., by White, 432. n.

(d) Citing 1 Sug. on Powers, 6th edit. 185. 194.; 1 Prest. Abstr. 340.; Co. Litt. by Hargrave, 112. a., n. 6.

(e) *Bridgman's Notes*, 108.



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held that a power like this can be exercised by a married woman during her coverture, without words of express dispensation, the appointment here is altogether void.

2. There is an undoubted excess in the execution of this power, the grandfather not being in any degree an object of the settlement. It is not disputed, that, where a certain quantity of interest is disposed of under a power, and it is sought to dispose of the rest in a manner not warranted by the power, the execution may be good *pro tanto*. But, here, that which vitiates the execution is engrafted upon and forms part of it. In *Sadler v. Pratt* (a), a lady having four children by her first husband, and three by her second, and having power to appoint a fund amongst the former only, appointed it amongst *all* her children equally, and declared, that, if her children by her first husband should refuse to share the fund with her other children, the whole fund should go to her youngest child by her first husband: and it was held by Sir *L. Shadwell*, V.C., that the appointment was not wholly void, but that the first class of children took each one seventh of the fund under it, and that the other shares went to them, as in default of appointment. *Brudenell v. Elwes* is an authority in favour of the defendant: the execution of the power was held bad in all beyond the limitation to the son. The principle now contended for is yet more strongly exemplified in *Denn d. Radclyffe v. Bagshaw*. (b) In *Adams v. Adams*, that which was well done in exercise of the power, was not at all involved in that which was ill done. The same remark applies to *Alexander v. Alexander* (c) and *Routledge v. Dorril*. (d) Here, the attempt to benefit the grandfather forms part and

(a) 5 *Simons*, 682.(b) 6 *T. R.* 512.(c) 2 *Ves. sen.* 640.(d) 2 *Ves. jun.* 357.



parcel of the appointment: and, though the attempt is abortive, it cannot operate to supply a new intention in the appointor. If *John Blomfield* the son took a vested interest, the conditional limitation to the grandfather could not take effect. [*Maule, J.* It may have been a vested interest, subject to be divested on the happening of the contingency adverted to. The question is, whether that estate is defeated by the subsequent limitation, though such subsequent limitation cannot itself take effect.] The estate is given to *John Blomfield*, the son, expressly and only upon the supposition that the appointor can give it contingently to the grandfather. Her obvious intention was, to give the estate to her son *John*, only in the event of his surviving his father, coupling that with an event over which her power did not extend; and therefore she has not given it to him at all.

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*Channell, Serjt.*, in reply. If the wife's right to exercise the power during coverture, is to depend upon the intention of the husband, there is strong reason here to assume that he intended that it should be so exercised. As to the second point, no doubt could have arisen had *John Blomfield* the son, survived his father: and the argument on the part of the defendant must be the same as if *John* were now living. As to the third point, the argument on the other side is, that the estate did not vest in *John*, or that, if vested, it was divested, in the events that have happened, by the conditional limitation. But it is submitted that the interest could not be divested by a conditional limitation that is void. In *Watkins on Conveyancing (a)*, it is said: "A remainder is to commence when the particular estate is, from its very nature, to determine; it is, as it were, a

(a) 9th edit., c. 15. p. 214.



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continuance of the same estate ; it is a part of the same whole. A conditional limitation is not a continuance of the estate first limited ; but it is entirely a different and separate estate. It is not to commence on the determination of the first ; but the first is to determine when the latter commences. It is the commencement of the latter which rescinds and destroys the former, and not the ceasing of the former which gives existence to the last." Here, the subsequent limitation never took effect at all ; and therefore the former estate remains. It is important to bear in mind that the will of Mrs. *Blomfield* was made when two children of the marriage only existed. It was under that supposition that the power was executed.

*Cur. adv. vult.*

COLTMAN, J., now delivered the judgment of the court (a).

This case, which was heard before the late Lord Chief Justice *Tindal*, my brothers *Maule* and *Cresswell*, and myself, was an ejectment brought for the recovery of six sevenths of certain copyhold lands, of which one *Mary Sida* was formerly seised in fee at the will of the lord of the manor of *Overhall* and *Netherhall*, and which she had, on the 2nd of *August*, 1764, surrendered, to the intent that the lord should regrant the same to the use of *Mary Sida*, until a marriage intended should be solemnized between her the said *Mary Sida* and *John Blomfield* the younger ; and, from and after the solemnization of the marriage, to the use of *John Blomfield*, for life ; and, after his decease, to the said *Mary Sida* and her assigns for her life ; and, after her decease, to the

(a) His lordship intimated that it was to be considered as the judgment of *Maule* and *Cresswell*, JJ., and himself ;

the late chief justice not having expressed any opinion upon the case.



of such child and children of the body of *Mary* by the said *John Blomfield* to be begotten, and for estate and estates or other interests, and in such shares, and proportions, manner, and form, charged and chargeable with any sum or sums of money any other of their children, as she the said *Mary*, by deed or deeds, writing or writings, to be by her read and delivered in the presence of and attested by one or more witnesses, or by her last will or testament writing, to be by her signed, sealed, and published as aforesaid, in the presence of, and attested by, three or more witnesses, shall or may limit, declare, devise, direct, or appoint; and, in default of appointment, to the use of the children of the marriage, in equal shares; and, in default of children, to the use of the said *Mary*, her heirs and assigns, for ever.

The marriage took place on the 9th of *August*, 1764. In *November*, 1765, *John Blomfield*, the eldest son of the marriage, was born; and in *November*, 1766, *William*, second son of the marriage, was born.

On the 5th of *January*, 1767, there being then no other children of the marriage, the said *Mary Blomfield* made her will, signed, sealed, and published in the presence of, and attested by, three witnesses; and thereby she directed, and appointed the said copyhold lands to her son, *John Blomfield*, and to his heirs and assigns for ever, from and after the decease of her husband *John Blomfield*, but, nevertheless, on condition that the said *John Blomfield* should pay to her other son, *William Blomfield*, 200*l.*, within a year and a day after the decease of her husband, in case her son *William Blomfield* were then living and twenty-one years of age; and if he should then be under the age of twenty-one, the said 200*l.* should be paid him by her son *John* as soon as he should come to the age of twenty-one years. And in case it should happen that neither of her sons

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aforesaid should be living at the decease of her husband, then and in that case she by that her will gave, devised, directed, and appointed all the said copyhold lands to her father-in-law, *John Blomfield* the elder, of *Dedham*, on certain trusts therein mentioned.

On the 16th of *March*, 1767, the said *John Blomfield* and *Mary*, his wife, were duly admitted to the said copyhold lands, pursuant to the surrender, to hold the same to the uses and in the manner mentioned in the said surrender. On the 6th of *July*, 1767, *William Blomfield*, the second son of the marriage, died. There were afterwards five other children of the marriage. In *June*, 1782, *Mary Blomfield* died, without having altered her will. On the 20th of *July*, 1820, *John Blomfield*, the son of *Mary*, the testatrix, died; and, on the 6th of *September* in the same year, *John Blomfield*, the husband, died. The lessor of the plaintiff is the youngest son, and customary heir, of *John Blomfield*, the eldest son of the marriage; and, as such, claimed the entirety of the said copyhold lands, as having been effectually appointed to *John Blomfield*, the son, in fee.

On behalf of the defendant, the claim of the plaintiff was resisted, on the ground that, the original surrender not containing any express clause empowering Mrs. *Blomfield* to make an appointment during coverture, the appointment was void on that ground. But we are of opinion that this objection is not valid. In Sir *Edward Sugden's* treatise on Powers (*a*), it is said: "It has long been firmly settled, that a married woman may execute a power, whether appendant, in gross, or simply collateral;" and, although a doubt has been expressed, in *Preston on Abstracts* (*b*), as to the correctness of this position, we are of opinion that the authorities referred to by Sir *Edward Sugden*, bear out his statement.

(*a*) 7th edit., vol. i. p. 184.

(*b*) Vol. i. p. 340.



But it was further objected, on behalf of the defendants, that the appointment was void, being made to persons to whom there was no power to appoint. On the part of the plaintiff, it was admitted, that, as far as there was an estate limited to *John Blomfield*, the father-in-law, the appointment was invalid; but that an appointment might be good as to part, though void as to other part, as in *Doe d. Nicholson v. Welford (a)*: and here it was said that the appointment to *John Blomfield*, the son, in fee, in the first instance, was within the power, and therefore valid; and that it ought not to be considered as invalidated by the subsequent appointment to one not within the limits of the power.

It may be admitted, that, where that part of the appointment which is within the power, can be separated from that which is excessive, so as to leave the good part wholly unaffected and independent of that which is bad, so much as is within the power may be supported, though the remainder is rejected: but the case appears to us to be otherwise when the extent and effect of so much as is within the power is greater or less, according as the remainder is valid or invalid. In the present case, it is contended that there is a good appointment in fee to *John*, the son: but the validity of this appointment in fee will depend on the validity or invalidity of the other branch of the appointment. If the appointment in this case had been to the younger children of the marriage, upon the contingency of the two elder sons dying before their father, such an appointment would have been free from objection: but, in that case, the estate given in the first instance to *John*, would be subject to a contingency by which it would be liable to be defeated; and the estate or interest given to *John*, the son, by the actual appointment, is not less subject

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(a) 12 Ad. &amp; E. 61.



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to be defeated in consequence of the gift over being to a person incapable to take, than if he had been capable. Taking this appointment as a whole, the intention was not to give *John* a fee, absolute at all events, but only in case he or *William*, his brother, survived the father. These considerations shew that the effect of the appointment to *John*, the son, cannot be disconnected from the consideration of the validity or invalidity of the subsequent appointment to the father-in-law, but that the one is dependent on the other.

It may be observed, that, in the present case, the lessor of the plaintiff is not entitled to recover the six-sevenths in dispute, unless *John Blomfield*, the son, took an absolute estate in fee under the appointment; and that it is immaterial to the present question whether the appointment was wholly void, in consequence of its being mixed up with, and dependent upon, that part of the appointment which was not within the power, or whether *John Blomfield*, the son, took an interest under the appointment, but one which was liable to be defeated on the happening of the contingency of both the elder sons dying in the lifetime of the father. In either way of viewing it, the claim under the appointment to *John*, the son, as a present existing interest, cannot, we think, be sustained: and the property, under the events which have happened, will go in the same way as if no appointment had been made.

Our decision on this point renders it unnecessary to say anything with respect to the other objections urged against the validity of the appointment.

Judgment for the defendant. (a)

(a) The case was afterwards turned into a special verdict, which was argued, upon writ of error, in the Exchequer

Chamber, in *Trinity vacation* last, and now (in *M. T. 1847*) stands for judgment. ∴



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GIBBS and Another, Churchwardens of the Parish  
of St. STEPHEN, WALBROOK, v. FLIGHT and  
Another.

, Nov. 24.

**T**ROVER for books, of which the plaintiffs were  
alleged to have been possessed, as of their pro-  
perty, as churchwardens of the parish church of *St.*  
*Stephen, Walbrook.*

From the  
year 1648  
(the earliest  
period of  
which any  
records could  
be found),  
the parish of  
*St. S. W.*, in  
the city of  
*London*, had  
been govern-  
ed by a select  
vestry, com-  
posed of the  
rector and  
churchward-  
ens, and those  
inhabitants  
who had  
served the  
office of  
churchward-  
en, or paid a  
fine for not

The defendants pleaded — first, that the plaintiffs  
were not churchwardens, as alleged — secondly, that  
the plaintiffs were not possessed, as of their property as  
churchwardens, of the said goods and chattels, or any  
of them — thirdly, not guilty; upon all which pleas issue  
was joined.

The cause came on for trial before the late Chief  
Justice *Tindal*, at the sittings in *London* after *Michael-*  
*mas* term, 1844; when a verdict was found for the  
plaintiffs, damages 40s., subject to the opinion of the  
court upon the following case: —

The parish of *St. Stephen, Walbrook*, has been a  
parish from time immemorial; and it contains sixty-

serving. Down to the year 1734 (except in two or three instances, and between  
1667 and 1672, when the affairs of the parish were deranged by the great fire  
of *London*), the course had been for the select vestry annually to choose, from  
among the parishioners at large, one person to act as junior churchwarden, who  
at the end of the year succeeded to the office of senior churchwarden. From  
1734 to 1775, no records of the parish could be found. And from 1775 to  
1824, the same course had been pursued except only in four instances. The  
number of persons composing the vestry on these occasions varied, sometimes  
many as sixteen being present, sometimes only three.

Upon a special case, leaving it to the court to draw such inferences from the  
facts as a jury would be warranted in drawing: —

Held, that a repeated (a) re-election of the same person to the office of senior  
churchwarden, without any necessity for so doing, was in violation of the custom,  
and, consequently, void.

(a) *Vide post*, 604. n. (a).



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seven houses, a great number of which are at present used as counting-houses. In 1670, after the great fire of *London*, the adjoining parishes of *St. Stephen, Walbrook*, and *St. Benet Sherehog*, were united by act of parliament, 22 *Car. 2. c. 11.*, for certain purposes; and still are so; having one common church, but separate churchwardens, and separate overseers of the poor.

Vestry books.

The oldest vestry-book of the parish of *St. Stephen, Walbrook*, commences with an entry of the 24th of *April*, 1648, and terminates with an entry of the 22nd of *February*, 1699. The second vestry-book commences with an entry of the 22nd of *February*, 1699, and terminates with an entry of the 9th of *August*, 1734. The next vestry-book in existence commences with an entry of the 19th of *April*, 1775, and terminates with an entry of the 21st of *April*, 1843.

Entries of  
meetings.

These books contain entries of the several vestry meetings of the said parish. The meetings are all entered in the same general form; the names of the members stated to have been present being written under the word "present," and varying in number, from time to time, as hereinafter mentioned.

The following is a copy of one of those entries:—

"At a vestry held in the vestry-house above said, the 24th of *March*, 1649, for the choice of church officers for the year *Anno Domini* 1650, according to antient custom, there was put into nomination for churchwardens, Mr. *Edward Curl*, Mr. *James Holmes*, Mr. *John Jekell*, Mr. *Isaac Hatton*, and *Thomas Wood*; and by hands was chosen Mr. *Curl* for a second year, and Mr. *John Jekell*, who did afterwards accept of the place.

"Present at the vestry —

" Mr. *Thomas Watson*, Minister.  
Mr. *Affable Fairslough*.  
Mr. *Thomas Hedges*.  
Mr. *Charles Lloyd*.  
Mr. *Richard Quincey*.  
Mr. *Richard Roe*.

Mr. *Edward Curl*.  
Mr. *William Underwood*.  
Mr. *Henry Randall*.  
Mr. *Andrew Jackson*.  
Mr. *Peter Hubland*.  
Mr. *John Sadler*."



These vestry meetings appear to have been usually held several times in the year; and it does not appear from the books, that any such meeting was held out of the parish, except shortly after the great fire of *London*, when, between the years 1662 and 1672, the meetings were sometimes holden at an inn called *The Cardinal's Cap*, in *Moorfields*, out of the parish.

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The earliest entry of any election of churchwardens, contained in these books, is of the date of the 25th of *March*, 1649.

Election of  
church-  
wardens.

During the period covered by the books, the churchwardens appear to have been always elected by the vestry of the parish, at the parish meetings. There is, however, in the books, under date the 12th of *April*, 1672, an entry which will be found set out *post*, p. 590.

The only entries of vestry meetings held prior to the 25th of *March*, 1649, or the 24th of *April*, are, of the 29th of *April*, 11th of *May*, 13th of *June*, and 7th of *November*, 1648. The qualification of the persons entered as having attended the last-mentioned meetings cannot be ascertained. Omitting the names of the persons who attended the said meetings in 1648, and who continued to attend subsequent meetings, and the names of the persons who attended the meeting of the 12th of *April*, 1672, and who continued to attend subsequent meetings as hereinafter stated (the circumstances attending which last-mentioned meetings are hereinafter stated), the vestry-books shew that the vestries of the said parish, throughout the periods covered by the said books, up to 1835, have, independently of the clergyman for the time being of the said parish, been constituted and composed of persons who previously to attending such vestries as vestrymen, or acting as members thereof, *had been elected churchwardens of the said parish, and also either accepted and*

Entries of  
meetings  
prior to  
*March*, 1649.



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Number of  
vestrymen in  
attendance.

*served the said office of churchwarden, or been fined for not doing so.*

In all the entries of vestries throughout the books, at which the parish business was transacted, the names of *at least three vestrymen, independent of the clergyman*, — who appears sometimes to have attended and sometimes not, — *are entered as having been present*. The largest number of persons that are entered as being present at any vestry held prior to the 12th of *April*, 1672, is, sixteen, which number appears only at a vestry held on the 11th of *May*, 1648.

From 1648 to  
1672.

It appears that, during the period from 1648 to 1672, there were held one hundred and two vestries, at which parish business was transacted. Three of these, viz. one on the 9th of *September*, 1652, one on the 30th of *April*, 1667, and the other on the 14th of *August*, 1667, were composed of *six* vestrymen only. Ten of the vestries were composed of *eight* vestrymen only. The remainder of the one hundred and two vestries were composed of numbers exceeding *eight*. Subsequently to the 12th of *April*, 1672, and up to the end of the first book (in 1699), the largest number that are entered as being present at a vestry is fifteen, which number appears only at two vestries, viz. a vestry held on the 19th of *March*, 1672-3, and a vestry held on the 24th of *May*, 1689.

During this period, viz. from the 12th of *April*, 1672, to 1699, it appears that one hundred and ninety-nine vestries were held, at which parish business was transacted. Two of these, on the 22nd of *March*, 1685, and 17th of *April*, 1695, were composed of *six* vestrymen only, exclusive of the clergyman, who also attended. Twenty-four of these vestries were composed of *seven* vestrymen only, exclusive of the clergyman, who also attended. Forty were composed of *eight* vestrymen only. The remainder of the one hundred and



vestries were composed of numbers *exceed-*

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6th of *November*, 1672, there is an entry in book as follows: —

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It was called on the 6th of *November*, at the but not above *five* or *six* of the vestry ap- one time together, they were not able to siness, but dismissed themselves."

7th of *October*, 1676, there is an entry as

17th, 1676. A vestry at Mr. *Maddison's*, in *Barge Yard*, was then appointed; but, not number appearing, nothing could be done."

18th of *December*, 1676, there is an entry as

19th of 6th, 1676. A vestry was then appointed in *Tavern*; but, not a full number appear- could be done."

3rd of *January*, 1676-7, there is an entry as

4th of *January*, 1676. A vestry was then ap- he *Fountain* tavern, in *Bucklersbury*; but, mber appearing, not any thing was done."

5th entry occurs under date 3rd of *April*, 1676.

6th of *May*, 1681, there is an entry as fol-

vestry held, &c., present, &c. (*six names enu- ng not a full vestry, they adjourned.*"

At commencement of the second book, in From 1699 to termination, 1734, the largest number that 1734.

as being present at any vestry when the ess was transacted, is *twelve*, which number wo occasions; and the smallest number so ght.

On the 21st of *February*, 1722-3, there n the vestry book as follows: —

It was summoned; but, *only seven appearing*,



1846. *viz.* Mr. *E. Edwards*, &c., *nothing was done*; but the  
 ——— persons present consented the churchwarden should give  
 GIBBS *Thomas Seaburn* 50s.; which was paid him in presence.  
 v.  
 FLIGHT. There was complaint made of the pavement afore the  
 church."

Under date of the 18th of *April*, 1729, there is an  
 entry as follows: —

"Memorandum, *April* 18th, 1729. A vestry being  
 regularly summoned for this day at five o'clock, for the  
 election of a new churchwarden, the following gentle-  
 men, after having waited about two hours after the  
 time, and no more coming, *they were obliged to se-*  
*parate without doing any business, for want of a suffi-*  
*cient number.*

"Messrs. *Thomas Browne.*

*Edward Bayley.*

*Philip Beach.*

*Charles Norray.*

} Churchwardens."

Under date of the 28th of *August*, 1730, there is an  
 entry as follows: —

"*Wm. Becher* and *Fr. Noguire*, churchwardens. A  
 vestry being summoned this 28th of *August*, 1730, the  
 following gentlemen attended, and, having waited near  
 two hours after the time appointed, *were obliged to se-*  
*parate for want of a sufficient number to do business.*

"Messrs. *Philip Beach.*

*John Knapp.*

*Edward Baily.*

*Samuel Stoiner.*

*Wm. Becher.*

*Fr. Noguire.*

} Churchwardens."

Under date of the 24th of *September*, 1730, the next  
 entry in the book, there is as follows: —

"*September* 24th, 1730. A vestry being legally sum-  
 moned, the following gentlemen appeared, when, *for the*  
*same reason as above, they were obliged to separate.*

"Messrs. *Philip Beach.*

*Edward Bailey.*

*Tho. Brown.*

*Wm. Farmer.*

*Wm. Becher, Churchwarden."*



Under date of 1st *February*, 1733-4, there is an entry as follows : —

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“*Samuel Whalley, Robert Teverell*, churchwardens. At a vestry summoned at the church, *February* 1st, 1733, present.

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“ The Reverend Dr. *Watson*.

‘*Messrs. Samuel Stoiner.*

*Peter Deschamps.*

*Jos. Greathead.*

*Joseph Mace.*

*Phil. Beach.*

*Saml. Whalley*, Churchwarden.

“ The vestry, *not being full*, adjourned.”

A similar entry appears under date the 22nd of *March*, 1733, the two churchwardens and three other vestrymen being present.

From 1648 to 1734, the period comprised in the two oldest vestry books, *there is no entry in the books of any election of a churchwarden at a vestry where fewer than eight* (including the clergyman of the parish) attended.

Entries of  
elections of  
church-  
wardens.

From 1734 to 1775, no vestry books are in existence.

From 1734 to  
1775.

From the commencement of the third book, in 1775, to its termination, in 1843, *vestries have been held composed of members varying from three upwards*; at which vestries, parish business (including the election of churchwardens) has been transacted: the largest number entered during this period, as present at a vestry when parish business was transacted, being *eleven*.

From 1775 to  
1843.

At most of the meetings during the last-mentioned period, at which churchwardens were chosen by fewer than *eight*, other parish affairs besides the election of churchwardens were taken into consideration, and other business transacted; as, the binding of apprentices, ordering an iron railing to be placed at the church, giving orders for preparing indictments for nuisances, the payment of money, and the like.

At the time of the great fire in *London*, that is to say, 1666, two persons of the names of *Wilkinson* and

1666.



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*Quincey* appear to have been serving the office of churchwardens, and appear to have acted as such for years consecutively after that calamity, that is to say up to and until 1672. *Wilkinson* appears to have been elected junior churchwarden at *Easter*, 1664, and *Quincey* appears to have been elected junior churchwarden at *Easter*, 1665.

Election of  
church-  
wardens from  
1648 to  
1734.

From 1648 to 1734 one fresh churchwarden appears to have been chosen every year, from the body of the parishioners at large, except during the interval before spoken of, between 1666 and 1672. Such person elected appears to have served, first, the office of junior, and the next year to have been elected and served, the office of senior churchwarden, except in four instances.

On the 3rd of *April*, 1672, the following faculty (extracted from the registry of the diocese of *London*), was issued by the then Bishop of *London* : —

Faculty of  
*April*, 1672.

“ *Humfrey*, by Divine permission, Bishop of *London* to the rector and parishioners of *St. Stephen, Walbrook*, *London*, and of our diocese and jurisdiction, sendeth greeting in our Lord God everlasting: Whereas, hath been alleged before us and the worshipful *Thomas Exton*, Doctor of Laws, our chancellor, by the rector and several of the principal inhabitants of the parish that, time out of mind, the affairs of the said parish have been agitated by such inhabitants who have either executed or paid a fine for their not discharging, the office of churchwarden, when elected thereunto, and by none other; and that, since the late dreadful fire, *Anno Dom.* 1666, most of the said vestrymen are settled in other places, by reason whereof the vestry is reduced to a number incompetent to transact the affairs of the said parish; and therefore they humbly desire that a certain number (namely, fourteen), may be added to the remaining ancient vestrymen, for the ordering and directing of such things belonging to their church as are to be done by



the parishioners thereof; and they have named Dr. *Henry Hodges* [and thirteen others] parishioners and inhabitants of the said parish, as such as are most likely to seek the good of the said parish, and well governing thereof, to have free power and authority, with the rector and remaining vestrymen, to act and intermeddle with and order all such matters as shall belong to the said church and parish; yet so that it may not excuse or privilege any of them so added from being chosen to and executing the office of churchwarden, or submitting to the usual fine paid formerly by such who desired to be free from the trouble of the said office: praying likewise, that, as many of the said persons as shall decay, amove out of the said parish, depart out this life, or otherwise become unfit for such society, that then such persons, the most sufficient of the said parish, as are the fittest for that service and trust, may succeed them, to be chosen by the greater number of the said vestry, or *at least by eight of them*, which shall meet in the said church, or, in defect thereof, in some convenient place, to be appointed by the said vestrymen or eight of them, upon publique warning given in the said church or place for the same meeting, — whereof the rector, or his curate for him, in his absence, and the churchwardens for the time being or some or one of them at the least, — shall be of that number: We, therefore, and our said chancellor, considering of their said petition, and finding that it doth tend to the rest, quiet, and good of the said church and parish, doth allow of the said petition, and so forth as we may lawfully and by the laws ecclesiastical of the realme, and the laws temporal of the land, approve, ratify, and confirm the same, and allow of their petition for their vestry concerning matters belonging to their church; with this limitation following, viz. that they do not at any time, nor for any occasion whatsoever, presume to call before them any minister or

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and do name and appoint the aforesaid persons, and every of them, to be vestrymen of the said parish, and do, as far as by law we can or may, appoint the said persons, or of them to be added vestrymen in the said parish, and none other, to intermeddle or order all such matters and business as shall appertain and belong to the said church and parish: and, as any of them shall happen to depart or remove out of the said parish, we choose other such persons of the said parish, to fill their room so dying or removing, *according to the custom of the said parish*, and to execute and perform all other things to vestrymen belonging, for the benefit of the said parish, and for the ordering and governing of such affairs as belong to the said parish church, with these limitations above specified. Whereof, we have caused the seal of our said church, which is used in this behalf, to be set to these presents. Dated, the third day of the month of *April* *Domini* 1672, and in the ninth year of our translation.

(Signed) “*John Shepherd*, Deputy Minister

The only entry in the books relating to the vestry is an entry as follows, dated the 12th of *April* 1672, and it is admitted that the phrase “new instrument” used in this entry, refers to the faculty:—

“Vestry Meeting, 1 At a vestry held at Mr. *Fletcher*



churchwardens], the new instrument for a select vestry, taken out of the Prerogative Court (many of the old vestrymen being removed in other parishes), was first read, and gave great satisfaction.

“Churchwarden *Quincey* did then move for electing to the place another churchwarden, and to chuse auditors of his accounts, being desirous to be eased of his long trouble and charges; upon which request they chose Mr. *John Sympson* to be churchwarden in the place of Mr. *William Wilkinson*, who, being removed into another parish for some years past, gave no assistance to the business. Mr. *John Sympson* was prevailed with to accept the office.

“Ordered, that Mr. *John Pollexfen*, Mr. *Dan. Vivean*, Mr. *Hen. Norton*, and Mr. *Gervase Cooper*, be auditors of churchwarden *Quincey*’s accounts, who was desired to be upper churchwarden next year.

“That the old feoffees should be acquainted that there was intended a new feoffment, and that they were desired to surrender their trust to those that should be chosen. There was then nominated and chosen trustees for parish concerns, *thirteen* persons.

“Mr. *Marriott* pleaded his privilege of choosing a churchwarden every other year; and having elected none since he was rector of the parish, did choose *Adrian Quincey* upper churchwarden, and prevailed with him to hold it.”

Of the persons mentioned in the entry as present at the meeting, the Rev. Mr. *Robert Marriott* was the rector of the parish, *four others* had been churchwardens before the grant or date of the faculty, and the remaining *eleven* do not appear from the books to have been elected churchwardens at any time prior to this meeting. Of these eleven, nine were subsequently within the next five years elected churchwardens, and either accepted and served that office, or were fined for non-acceptance;

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and the two remaining never appeared at any subsequent to this date, and do not appear, from books, ever to have qualified as churchwardens.

From the year 1835, the overseers for the time of the poor of the parish who had not been previously elected churchwardens, have attended the vestry meetings, and acted thereat, when parish business has been carried on, in addition to the vestrymen who had previously been elected churchwardens, and who had held that office, or been fined.

Election of  
church-  
wardens from  
1775 to  
1824.

From 1775, when, as before stated, the books resumed their commence again after a gap from 1734, the practice of electing a churchwarden every year from the ranks of the parishioners at large, appears to have prevailed down to 1824; such person so elected, served firstly, the office of junior, and the next year elected to, and served, the office of senior churchwarden, and so in four instances. It appears from the entries in the books, that the plaintiff *Gibbs* was elected and served the office of junior churchwarden at *Easter*, 1811, and that of senior the two following years; that he was again elected to, and served, the office of junior in 1813, and, during the following years, viz. up to and including the supposed re-election in 1844, was elected to, and served, the office of senior churchwarden.

Election of  
*Gibbs* in  
1811.

*John Pelly Atkins* was elected junior churchwarden in 1825, by the vestry, and was annually re-elected junior churchwarden until and at *Easter*, 1840. At *Easter*, 1841, *W. E. Eddison* was elected junior churchwarden by the vestry, and was annually re-elected junior churchwarden until and at *Easter*, 1843.

Election of  
the two plain-  
tiffs in 1844.

On the 12th of *April*, 1844, at a vestry meeting convened, the plaintiffs were unanimously elected churchwardens, *there being then present at such meeting and acting in and about such election*, the two plaintiffs, *J. P. Atkins*, *William Adams*, *W. E. Eddison*



Alexander and G. F. Blogg. Of those seven, *William Alexander*, the plaintiff *Whitaker*, and *G. F. Blogg*, were overseers of the poor of the said parish, but *had never before then been elected to and served the office of churchwarden, or been fined for not doing so.* The plaintiff *Gibbs, Atkins, Adams, and Eddison*, had before then been elected to and served the said office of churchwarden.

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At the time of the election, or supposed election, of the plaintiffs, in 1844, *there were only seven persons in existence who had either been elected and served the office of churchwarden, or been fined for not doing so.* The Rev. Dr. Croly was at this time rector of the parish.

At the visitation of the archdeacon of the archdeaconry of *London* (the said parish being within his jurisdiction and archdeaconry), duly held, on the 6th of *May*, 1844, the plaintiffs subscribed the usual declaration of office.

It was agreed to be admitted on the argument, for the purpose thereof (but for that purpose only), that, on the 11th of *April*, 1844, the defendants were duly elected churchwardens of the said parish, by the parishioners at large, supposing the right of election to be the parishioners at large; and that, on the 6th of *May* following, at the visitation, and at the time and place aforesaid, they subscribed the usual declaration of office.

The plaintiffs and defendants have long been inhabitants of the parish, and resident householders there.

It was admitted, that, after the election, or supposed election, of the plaintiffs, in 1844, and after they had been admitted, and made their declaration aforesaid, and before the commencement of the action, the defendants had possession of, and converted to their own use, certain books in the declaration mentioned, to which the



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churchwardens for the time being were entitled, and which the plaintiffs had previously, but after their supposed election and admittance as aforesaid, demanded, as such churchwardens, from the defendants; and that the value of these books was 40s.

The plaintiffs contend, that, upon the evidence adduced and hereinbefore set forth, they were churchwardens of the parish, and entitled to maintain the action.

The defendants, on the other hand, contend that there exists no custom to sustain the election of the plaintiffs as churchwardens — first, because, admitting the existence of a legal select vestry in other respects, the same was subject to two essential conditions or qualifications, viz. that there must be *eight* at least of such vestry to form a quorum in the election of churchwardens; and that fresh blood must be infused into such vestry every year, by the election of a fresh churchwarden, chosen from the body of the parishioners at large — secondly, because, in 1672, the number of vestrymen was reduced below *eight*, and so the custom (if any) thereby determined — thirdly, because the custom contended for by the plaintiffs was uncertain and unreasonable, and therefore void in law — fourthly, because, on the 12th of *April*, 1844, at the supposed election of the plaintiffs, there were not present in the meeting *eight* vestrymen, *i. e.* eight persons who had either been elected churchwardens before and served that office, or been fined for not doing so; the number of persons so qualified, and then present, being only *four* — fifthly, because the custom (if any) being, that a new churchwarden should be chosen every year, the junior succeeding to the senior, and the latter retiring every year, the plaintiff *Gibbs*, as senior churchwarden of the year before, ought to have retired, instead of being re-elected for the year 1844 — sixthly, because the Rev. Dr. Croly,



the then rector of the parish, had the right, in the year 1844, to elect one of the churchwardens.

The question for the opinion of the court is, are the plaintiffs entitled to maintain this action? The court to be at liberty to draw such inferences of fact as a jury would be justified in doing.

If the plaintiffs are so entitled, the verdict is to stand; if not, a nonsuit is to be entered. Liberty is reserved to either side to turn the case into a special verdict; the court to direct the conclusions of fact properly deducible from the case, for the purpose of their being stated in the special verdict.

The case was argued in *Easter* term last.

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Sir *T. Wilde*, Serjt. (with whom were *Channell*, Serjt., and *Cordling*), for the plaintiffs. The facts set out in the special case, shew that the parish of *St. Stephen, Walbrook*, has immemorially been governed by a select vestry: no trace is to be found of the existence at any time of an open vestry. And it appears that the number of vestrymen in attendance has varied from time to time; as many as *sixteen* being present on some occasions, on others only *three*. But it nowhere appears what was the smallest number of select vestrymen *existing* at any one time. The qualification for a select vestryman seems always to have been, the service of the office of churchwarden, or the being fined for not serving. The faculty obtained in *April*, 1672, professed to add fourteen to the number of vestrymen, and to make *eight* a quorum. From 1648 to 1734, the course was, for the select vestry to choose annually one person to act as junior churchwarden, the same person succeeding to the office of senior churchwarden the next year. From 1666 to 1672, the custom appears to have been interrupted in consequence of the fire of *London*. From 1734 to 1775, there are no records found. And,



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from 1775 to 1824, the same course seems to have been pursued, except only in four instances. Whether or not the election of the plaintiffs to the office of churchwarden, as stated in the case, is valid, depends upon whether there is an immemorial custom for this parish to be governed by a select vestry, and whether such custom is an existing and available custom, and has been properly observed upon this occasion. At one time, it was considered that the bishop had power, by faculty, to create or to control the select vestry. That has since been corrected. Such a faculty was held, in *Berry v. Banner* (a) and *Golding v. Fenn* (b), not to be binding in law. *Darson v. Fowle* (c) is to the same purpose. The acceptance of a new void charter does not affect the validity of an old one. So, of a lease. So, an instrument failing to operate as a will, is no revocation of a former valid testamentary paper. Regard being had to the peculiar situation of the parish at the time, it is not remarkable that the assistance of the bishop should be invoked. It is contended on the part of the defendants, that it is an essential ingredient in the custom, that the election of churchwardens should take place at a vestry meeting at which *eight* vestrymen at least should be present. [*Coltman*, J. There is no instance, before the date of the faculty, of a vestry meeting being adjourned for want of the attendance of a sufficient number of vestrymen.] None. In *Golding v. Fenn*, it is distinctly laid down, that a custom that there shall be a select vestry of an indefinite number of persons, continued by election of new members made by itself, and not by the parishioners, is valid in law; and that such custom is not affected by the want of a minimum. In delivering the judgment of the court there, Lord Ten-

(a) *Peake*, N. P. C. 156.

(c) *Hardres*, 378.

(b) 7 B. & C. 765., 1 M. & R. 647.



*terden* said: "It was objected, that, if the number be not limited, the vestry may consist of too many persons, even of the whole parish. This point, however, was little urged, and there is obviously no weight in it; the great complaint against select vestries being, that they consist, not of too many persons, but of too few: and, if a maximum had been fixed by custom in the very remote times to which custom must go back, the number that might have been proper in those times might, and probably would, be too small for the great increase of population that has gradually taken place. We are also of opinion that a custom of this kind is not void in law for want of a minimum. But, although we are of this opinion, as a matter of law, I would by no means have it understood that we think the evidence or the verdict in the present cause, establishes the fact that there may not be a minimum in this parish. It will be quite consistent with the verdict, and not inconsistent with the evidence, that the number should never be less than the lowest that can be found in any of the lists; and this, I believe, will in no list be found so few as twelve. The form of the issue raised no question of this kind. Now, although no numerical minimum be fixed by the custom, it by no means follows as a consequence that the number may be reduced to two or three, as the objection supposes; the law may consider it as part of such a custom as the present, that there shall be a *reasonable* number. I am aware that this may lead to questions what shall be a reasonable number. Such a question, if raised, would be to be decided with reference to long-established usage, and to the population of the parish. That number which might not be too small and not unreasonable three or four centuries ago, in a parish in which there might not be more than a dozen substantial householders, or even fewer, might not be

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reasonable on a change of circumstances, when, **b** covering fields with houses, the number might be **in-**creased more than a hundred-fold. And, whatever may be thought of the degree of influence that the love of power exercises on human conduct, I believe the love of ease does not exercise less; and, as no instance is known in practice, in which two or three persons have gratuitously taken upon themselves the whole burthen of administering such of the affairs of a populous parish as belong to a vestry, I do not think there is any reason to provide in theory against such an occurrence, by requiring a definite minimum as essential to the validity of a custom. The question in this case, as in many others, turns upon the balance of convenience. We think it more convenient that a custom of this nature should leave the number undefined, capable of being regulated by reason, and varying with the changes that time produces, than that there should be any fixed point, from or below which no change of circumstances should allow a departure." It appears that the number of vestrymen who attended the vestries between the years 1775 and 1843, varied: in some instances *eleven* being present; in others, as few as *three*. Too much effect must not be given to the adjournments for want of a full vestry: it was perfectly competent to the parties assembled to say that they would not transact particular business without a fuller attendance. The statute 59 G. 3. c. 12., commonly called *Sturges Bourne's act*, which enables parishes to be governed by select vestries, gives a maximum and a minimum — not exceeding twenty, nor less than five, in addition to the minister, churchwardens, and overseers for the time being. It cannot, therefore, be considered that three or four would be an unreasonably small number for a parish like this, which contains only sixty-seven houses. That



act did not interfere with antient select vestries: *The King v. St. Martin's-in-the-Fields.* (a)

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The only essential qualification for a select vestryman is, that he should have served the office of churchwarden, or should have been fined for not serving it. It nowhere appears that the custom requires that the person so elected churchwarden should always be a new inhabitant. The churchwardens were perfectly competent to be re-elected from time to time.

The third objection is but a repetition in substance of the first.

*Golding v. Fenn* is an answer to the fourth objection. The custom here is, that the select vestry shall be composed of those who have served the office of churchwarden, or been fined; and that the churchwardens be selected by the vestry from amongst their own body, or from the parish at large, in their discretion. *Golding v. Fenn* is a distinct authority to shew that such a custom may be valid.

The last two objections in truth amount to nothing. By the canon, the right to appoint churchwardens is in the rector and the vestry; and, if they disagree, each is to appoint one. In this parish, the appointment has immemorially been made by the select vestry: the rector has never interfered but once, and that was in 1672, shortly after the faculty was obtained. It does not appear upon what Mr. *Marriott* founded his claim.

*Talfourd*, Serjt. (with whom was *G. Atkinson*), for the defendants. The claim on the part of the plaintiffs is, not merely that a select vestry has existed in this parish from time immemorial, chosen from among the inhabitants who have served the office of churchwarden, or submitted to the usual fine for not serving; but that

(a) 3 B. & Ad. 907.



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the circumstance of a party having served that office, or having been fined, makes him *ipso facto* a select vestryman, and that the select vestrymen so constituted are at liberty to re-elect themselves to the office of churchwarden from time to time until they sink down to a minimum of *three* — which happens to be the smallest number that has yet had the conduct of the affairs of the parish. It appears from the case, that this parish has immemorially been governed by a select vestry, and that the churchwardens have formed part of that body. But it sufficiently appears to be an essential part of that custom, that the number of the select vestry should be kept up to *eight*, or at least that it should be kept up by the annual election of one churchwarden from among the general body of the parishioners; this having been the course adopted, with few exceptions, from the year 1648, when the annals of the parish commence, down to 1824, when *Gibbs* was first elected. The case is not affected by the 59 G. 3. c. 12., though that statute may afford an argument to shew the utter worthlessness of the custom as contended for on behalf of the plaintiffs. There, the defined minimum is five; but to these are to be added the rector, curate, or other minister, and the churchwardens and overseers for the time being. The smallness of the number of select vestrymen in 1652, does not now admit of explanation; but, from 1667 to 1672, the diminution of number is amply accounted for by the circumstances adverted to in the faculty. [*Cresswell, J.* Your argument assumes the necessity for the election of a new and additional one every year.] It is enough for my purpose to contend that a party cannot be elected continuously for a long series of years, as has been done here. This differs essentially from the custom relied on in *The King v. Brain (a)*, which did not involve the principle

(a) 3 B. &amp; Ad. 614.



of decay that renders this custom bad. *Golding v. Fenn* is also perfectly distinguishable: there, the custom was for a reasonable, though an indefinite number. [Erle, J. You contend that the office and character of select vestryman is incompatible with that of churchwarden, when the number of select vestrymen is, by any accident, reduced to three?] It is hardly necessary to push the argument to the length of a legal incapacity. The law upon this subject cannot be stated more neatly and precisely, than was done by Tindal, C.J., in delivering the judgment of the court of error in *Tyson v. Smith* (a). "It is," says his lordship, "an acknowledged principle, that, to give validity to a custom, — which has been well described to be an usage which obtains the force of law, and is, in truth, the binding law, within a particular district, or at a particular place, of the persons and things which it concerns (b), — it must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption." In *Naylor v. Scott* (c), a custom that a sum of money shall be paid at the usual time after a woman's delivery when she should be churched, was held to be void for uncertainty, if it does not shew what that usual time is; and also unreasonable, because it obliged the husband to pay, if the woman was not churched at all, or if she went out of the parish, or died, before the time of churching. In *Beckwith v. Harding* (d), a custom for the churchwardens of a parish to set up monuments, &c., in a church, without the consent either of rector or ordinary, was held to be bad. In *Owen v. Stainoe* (e), a custom to choose a supernumerary (all the places being

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(a) 9 Ad. & E. 406., 1 P. & D. 307. And see 6 Ad. & E. 745., 1 N. & P. 784.

(b) See *Davis's Reports*, 31,

(c) 2 Ld. Raym. 1558.

(d) 1 B. & Ald. 508.

(e) *Skinn.* 45., Sir T. Jones, 199., *Rex v. Stenhow*, 2 Show. 100



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full), who should be admitted upon the death of the next prebendary, was held to be void and foolish, "for, there cannot be election but to a void place." In *Needler v. The Bishop of Winchester* (a), Lord Hobart says that "custom must not deprive the law of nature." So, in *Vin. Abr. Customs*, (E), pl. 5., it is said that "a custom against reason, is void." And in *Bac. Abr. Customs*, (C), it is said: "Every custom ought to appear to have had a reasonable commencement, and that at first it was voluntarily agreed to, for the better promoting of trade and commerce, the suppression of fraud, the greater security of men in their estates and possessions, &c.; and, in such cases, though the custom be contrary to the common law, or against the interest of a particular person, yet it shall be good. But every custom which appears to have been unreasonable in itself, as being against the good of the commonwealth, or injurious to a multitude, though beneficial to a particular person, or to owe its commencement to the arbitrary will and oppression of a powerful lord, and not to the voluntary agreement of the parties, is void; nor can any continuance of such a custom give it a sanction, or make that good which was void in its creation." In *Fryer v. Johnson* (b), a custom in a parish, time out of mind, "that every parishioner has a right to bury his dead relations in the church-yard as near to their ancestors as possible," was held bad. A vast number of authorities upon this subject will be found collected in the case of *Hilton v. Lord Gravelle*. (c) In the present case, the custom relied on for the plaintiffs is clearly repugnant to justice.

Sir *T. Wilde*, in reply. There is nothing in the evidence stated in this case to shew that there was any defined

(a) *Hob.* 225.  
 (b) *2 Wils.* 28.

(c) *5 Q. B.* 701.



imum. The recital of the custom in the faculty, is to shew that there was none. Nor is there any-  
g to shew that the yearly election of a new church-  
len from among the general body of the inhabitants,  
an essential part of the custom.

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*Cur. adv. vult*

ALTMAN, J., now delivered the judgment of the

his was an action of trover for books claimed by the  
tiffs as churchwardens: and the question is, whether  
were churchwardens of the parish of *St. Stephen,*  
*brook*, for the year beginning on the 12th of *April*,  
; in other words, whether the election of the  
tiff *Gibbs* into the office of senior churchwarden on  
day, is void, he having been constantly elected into  
ame office, from the year 1825.

le find, from the evidence, that, according to the  
m of this parish, two churchwardens are to be  
n annually by the select vestry, and that the select  
y is composed of the clergyman for the time being,  
of those who have been elected to the office of  
chwarden, and have either served it, or been fined  
ot doing so.

is stated that the records of the parish begin in  
; and that, from thence to 1734, one fresh church-  
len was chosen annually from the parishioners at  
e, who served the office of junior churchwarden for  
year, and who was elected and served the office of  
r churchwarden for the next year, with an ex-  
ion from 1666 to 1672, which is immaterial, as oc-  
ned by the fire of *London*, — and with an ex-  
ion of four other instances only; that, from 1734 to  
i, there are no records; and that, from 1775  
1824, the same course was pursued, except in four  
nces only.



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Upon this statement, a presumption is raised that the course so generally adopted is the course required by the custom. And this presumption is strengthened by considering that the union of interest between the select vestry and the other parishioners would probably be maintained by adhering to it, and might be destroyed by departing from it; and that the parishioners would, in prudence, take precautions to secure such union, before they would consent to establish a custom for a select vestry.

If the succession to the office of senior churchwarden could be legally stopped, by continuing the same person in that office for many years, the same rule would apply as to the office of junior churchwarden. And, indeed, it appears, that, for fifteen years, while the plaintiff Gibbs held the office of senior churchwarden, one person held the office of junior churchwarden: and the consequence has been, as would be expected, that the number of the select vestry has been most inconveniently reduced.

We, therefore, take the effect of the evidence to be, that it was part of the custom by which the right of electing churchwardens was conferred upon the select vestry, that a new person should be elected every year into the office of junior churchwarden, and that the junior churchwarden of the preceding year should succeed to the office of senior churchwarden. If such be the custom, it follows that a repeated (a) re-election of the same person to the same office of senior churchwarden, without any necessity for so doing, is contrary to the custom; and, consequently, the election in question of the plaintiff Gibbs was not valid, and a nonsuit ought to be entered.

Rule accordingly.

(a) The principle would appear to be applicable in the case of a *single* re-election.

(b) In the following *Hilary* term a rule of court was made,

by consent, referring it to Mr. F. Robinson to frame a special verdict upon the principle of the above decision.



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## REVELL v. WETHERELL, Clerk.

Nov. 2.

defendant being brought up for the purpose of being charged in execution for the damages and recovered against him in this action,

on his behalf, objected, on the ground that the defendant had on a former occasion repudiated the judgment on which this action was brought. [*Wilde, C.J.* did not the defendant make a substantive application to the court to stay the proceedings, if there were ground for it?] He has been a prisoner ever since.)

It is no ground of objection to a defendant's being charged in execution, that the plaintiff had on a former occasion repudiated the action.

*Wilde, C.J.* If there be ground for the objection, the defendant will have been made the subject of a special application to the equitable jurisdiction of the court. Instead of pursuing that obvious course, the defendant chooses to proceed in a way that does not conveniently admit of an objection.

I think the defendant must be charged, but I will not give prejudice to any motion he may be advised to make.

Rest of the court concurring —

The prisoner was committed in execution.

It appears to be now the rule that an application to stay proceedings for irreparable injury will not be entertained on account of an unreasonable lapse of time in the case of a prisoner. *Constable v. Fothergill*, 10 Dowl. P. C. 591.;

*Warne v. Haddon*, 9 Dowl. P. C. 960.; *Davies v. Watkins*, 2 Dowl. N. S. 930.; *Bicknell v. Wetherell*, 1 Q. B. 914., 1 G. & D. 230.; *Claridge v. Mackenzie*, 5 M. & G. 251., 6 Scott, N. R. 571.



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## DAVIS v. EDWARD TOWNSEND BARKER.

Nov. 24.

*Semble*, that it is not necessary, upon a rule to compute, to produce the bill or note before the master.

At all events, a variance between the name of the defendant on the record and that in the bill or note, will not justify the master in declining to proceed on the rule.

**T**HIS was an action by the payee against the maker of a promissory note. The defendant suffered judgment by default. The note being produced before the master, upon a rule to compute, and bearing the signature of "*E. Barker*" only, the master declined to proceed.

*Gray* now applied for the direction of the court. He submitted that the production of the note or bill upon a rule to compute, was never necessary, except for the purpose of seeing if any payments had been indorsed on the back; and that, since the rules requiring payments to be pleaded, the production of the instrument was no longer essential, either upon the execution of a writ of inquiry, or upon a computation under a rule of court: *Lane v. Mullins.* (a) [*Maule, J.* Upon a writ of inquiry, the defendant might prove payments. But the master does not receive evidence. The form of the rule is, that he do *compute*, not *inquire*.] There is nothing to prevent the defendant from shewing payments before the master.

**WILDE, C. J.** It does not strike me that the variance in the name could be of any importance, after the defendant had suffered judgment by default. It is not, I think, at all necessary to produce the note before the master upon a rule to compute. The only ground for its production, that I am aware of, is that which has

(a) 2 Q. B. 254.



been suggested; and, in the case of a judgment by default, that reason fails. Certainly the difficulty that presented itself here was no valid ground for not proceeding to compute. There need be no rule drawn up; the master will act upon this intimation.

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The rest of the court concurred.

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DOE dem. BURTON v. ROE.

Nov. 25.

C. CLARK moved for judgment against the casual ejector. The officer had declined to draw up a rule, on the ground that the notice at the foot of the declaration required the tenant to appear "on the first day of Michaelmas term," instead of "in Michaelmas term," generally. It was submitted, that the practice requiring the tenant to appear in the term generally, was founded upon a rule of court (a) which did not warrant it; that the party could not have been misled; and that, at all events, a rule nisi might be granted.

The court refused to grant even a rule nisi for judgment against the casual ejector, where the notice at the foot of the declaration required the tenant to appear "on the first day" of the term, instead of in the term generally.

WILDE, C. J. The notice in question is intended for the information of laymen. The rule of practice being well ascertained, we are not at liberty to consider, upon equitable grounds, how far it may with propriety be departed from. I do not think we ought to grant even a rule nisi.

MAULE, J. You may have misled the party into supposing, that, unless he appeared on the first day of

(a) *Vide Adams on Ejectment*, 4th ed. p. 12.



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the term, it would be useless for him to appear at a  
A man is not to be turned out of his land, without  
having a proper legal notice to appear and defend his  
possession.

The rest of the court concurred.

Rule refused.

### WATSON v. KING.

Nov. 7.

In debt for use and occupation, one of the plaintiff's witnesses, on cross-examination, said that he had heard, from the plaintiff's attorney, that there was an agreement in writing : — Held, that this was no evidence of the existence of an agreement, so as to render its production by the plaintiff necessary.

DEBT for use and occupation tried before the under-sheriff of *Middlesex*.

One of the plaintiff's witnesses stating, upon cross-examination, that he had heard from the plaintiff's attorney, that the defendant had held the premises in question under a written agreement, it was objected, for the defendant, that the agreement ought to be produced ; and *Brewer v. Palmer (a)* was cited, where it was held, that, where premises have been demised by an agreement in writing, but not on stamped paper, the plaintiff is bound to put in the writing.

The under-sheriff declined to nonsuit the plaintiff, but gave the defendant leave to move to enter a nonsuit, if the court should be of opinion that the agreement was properly shewn to exist.

*Hawkins* now moved accordingly, and relied upon the case cited at the trial.

WILDE, C. J. I am of opinion that there was no evidence in this case, to shew that there was an agree-

(a) 3 *Esp. N. P. C.* 213. : recognised in *Ramsbottom v. Tunbridge*, 2 *M. & S.* 434.



ment in writing, and therefore that the necessity for its production did not arise. The attorney is not the agent of the client for the purpose of making admissions, except in the cause and for the purpose of the cause. All that appeared here was, — the defendant having been proved to have held the premises at a certain rent, — that one of the plaintiff's witnesses heard the plaintiff's attorney say that there was an agreement in writing. That clearly was no evidence at all to affect the plaintiff.

The rest of the court concurring —

*Hawkins* took nothing.

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### MILLINGTON v. CLARIDGE.

Nov. 17.

C. JONES, Serjt., moved to make an order of nisi prius, referring a cause to arbitration, a rule of court. The officer had refused to draw up the rule, because the order reserved no power to the parties, in terms, to make it a rule of court. He cited *Harrison v. Smith (a)*, where the want of such a reservation was held to be immaterial.

An order of nisi prius, referring a cause to arbitration, may be made a rule of court, without any express reservation of a power so to do.

MAULE, J. The case of a submission by bond is regulated by statute. (b) But this being a proceeding in a cause, there can be no doubt as to the power of the court to make the order a rule of court, though the parties have not expressly provided for it.

The rest of the court concurring —

Rule absolute.

(a) 1 D. & L. 876.

(b) 9 & 10 W. 3. c. 15.



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WOOLLEY and Another v. SMITH.

Nov. 24.

By a charter-party entered into between *A.* and *B.*, it was provided that the ship, which was described to be of the burthen of 310 tons, or thereabouts, should proceed to *Ichaboe*, and there receive a full and complete cargo of guano (which was to be taken to the ships' boats at the merchant's risk and expense, the captain to

**A**SSUMPSIT on a charter-party. The declaration, dated the 6th of *May*, 1845, stated, that, by a certain charter-party made between the plaintiffs, therein described as owners of the ship *Robert*, of the burthen of 310 tons, or thereabouts, it was agreed that the ship should, with all convenient speed, proceed to *Ichaboe*, or *Round Island*, or so near thereto as she could safely get, and there receive a full and complete cargo, consisting of guano, which was to be taken to the ship's boats at the merchant's risk and expense, the captain to render all possible aid with his crew in rigging stages, not exceeding what she could reasonably load and carry, over and above her cabin tackle, apparel, provisions, and furniture; and, being so loaded, should there— with proceed to a safe port in the united kingdom, calling at *Cork* or *Falmouth* for orders, and waiting there a return of post from *Liverpool*, or so near thereto as she could safely get, and deliver the same agreeably (render all possible aid with his crew in rigging stages), not exceeding what she could reasonably stow and carry, and therewith proceed to a port in the United Kingdom; and *B.* agreed to load the vessel, and to pay freight 4*l.* 10*s.* per ton, and 5*l.* per day demurrage. If labourers went out in the vessel, the owner to be allowed 1*s.* per man *per diem*. Penalty for breach, 1800*l.* Should the vessel arrive on or before a given day, *B.* was to pay 50*l.* over and above the specified freight.

An action having been brought against *B.* in *April*, 1845, for not providing cargo pursuant to the charter-party, judgment by default was signed on the 1*st* of *July*, and, on the 26th of *November*, the damages were assessed at 1644*l.* 3*s.* 9*d.* and final judgment was signed on the 8th of *December*.

On the 16th of *May*, 1845, a *fiat* issued against *B.*, under which he obtained his certificate on the 22nd of *August*, subject to a suspension of six months from the 8th of *July*.

*B.* having been taken upon a *ca. sa.* on the 3rd of *February*, 1846:—

Held, that this was not a debt or demand provable under the *fiat*; and, consequently, that *B.* was not entitled to be discharged from custody.



to bills of lading, and so end the voyage; restraint of princes and rulers, the dangers of the sea and navigation, fire, pirates, and enemies, during the said voyage, always excepted: fifty running days to be allowed the said merchant, if the ship should not be sooner despatched, for loading the ship, to commence from the period of the vessel being in a proper loading berth, which was to be calculated within twenty days after arrival of the vessel at the port of loading; to be discharged as soon as the custom of the port permitted: and the defendant did thereby promise and agree to load the said vessel with the said cargo at *Ichaboe*, or as above, and also to receive the same at her port of delivery as therein stated, and also that he should and would pay freight as follows — 4*l.* 10*s.* *British* sterling per ton of 20 cwt., delivered at the Queen's beam; payment whereof was to become due and be made as follows — one half to be made in cash on arrival at the discharging port, and the remainder, on the true delivery of the cargo, by good and approved bills on *London*, at three months' date; and also should and would pay demurrage the sum of 5*l.* *British* sterling per day, to be paid day by day for each and every day the said vessel should be detained over and above the laying days and times therein stated; but the vessel was not to be required to remain on demurrage longer than ten days: the master to sign bills of lading, as tendered, without prejudice to the charter-party: and the charterer agreed to send out materials for the stages and conserving the guano, which were to be taken free; also labourers, if preferred to hiring them on the spot; but, in either case, the expense was to be borne by the charterer: if labourers went out in the vessel, the owners to be allowed 1*s.* per man *per diem*. And, for the true performance of the agreement, the plaintiffs did thereby bind themselves, their heirs and assigns, the said vessel,

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her freight and appurtenances, and the defendant did, in like manner, bind himself, his heirs and assigns, and the cargo to be taken on board the said vessel, each unto the other, in the penal sum of 1800*l.* of good and lawful money of *Great Britain*; it being agreed, that, for the payment of all freight, dead freight, and demurrage, the plaintiff should have an absolute charge and lien upon the said cargo firmly by those presents: and, by a certain memorandum in writing thereunder written, signed by the plaintiffs and by the defendant respectively, it was witnessed that the plaintiffs and the defendant agreed to send off the *Robert* from *Liverpool* to *Ichaboe* direct, in ballast, as soon as ready; and that, should she arrive, on her return, either at *Cork* or *Falmouth*, on or before the 30th of *April*, 1845, then, that the defendant (the charterer) should pay the plaintiffs, the owners as aforesaid, the additional sum of 50*l.* clear, over and above the freight specified in the charter-party; and that, should the vessel not arrive at the time so specified as above, then that agreement, as to the payment of such additional sum, was to be void: Mutual promises: Averment, that the ship did, with all convenient speed, proceed to *Ichaboe* from *Liverpool* direct, in ballast; and, although the said ship arrived at *Ichaboe* aforesaid on the 24th of *November*, 1844, and, within twenty days of such arrival as aforesaid, the said ship lay in a proper loading-berth, and the plaintiffs were ready and willing to receive such cargo as aforesaid, on the same being taken to the ship's boats at the merchant's risk and expense, and the captain was then ready and willing to render all possible aid with his crew in rigging stages, and in other necessary respects, and the plaintiffs would also then have received and loaded such full and complete cargo as aforesaid, on the same being taken to the ship's boats at the merchant's risk and expense, and the captain would then



ive rendered all possible aid with his crew in rigging  
ages, and in other necessary respects, according to  
e tenor and effect of the said charter-party, and the  
fendant's promise in respect thereof; and, although  
e said ship then lay in such proper loading-berth at  
*taboe* for a long space of time, to wit, for the said  
ace of fifty days in the said charter-party mentioned,  
which the defendant then had notice; yet the defend-  
t did not, nor would, within the number of days in  
e charter-party mentioned, or at any time afterwards,  
ad the same with such cargo of guano as aforesaid,  
it therein failed and made default: by reason of which  
veral premises, the plaintiffs were unable to load a  
omeward cargo in and on board their said ship, and  
ad lost and been deprived of the freight and reward,  
nd of great gains, profits, and emoluments which might  
nd would have become due and payable to them under  
nd by virtue of the said charter-party and memoran-  
um respectively; and the plaintiffs, during a long  
ace of time, to wit, the space of six months then next,  
d wholly lost and been deprived of the use of the  
d ship.

There was also a count for the use and hire of the  
p, and a count upon an account stated.

On the 1st of *July*, 1845, judgment was signed for  
nt of a plea, and on the 16th of *November* the  
mages were assessed, upon a writ of inquiry, at  
44l. 3s. 9d.; and final judgment was signed on the  
1 of *December*.

A *fiat* in bankruptcy issued against the defendant on  
3 16th of *May*, 1845, under which he was duly de-  
ured a bankrupt. On the 22nd of *August*, he obtained  
e allowance of his certificate, subject to a suspension  
r six months from the 8th of *July* then last.

On the 3rd of *February*, 1846, the defendant was

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arrested, under a *ca. sa.* issued by the plaintiffs on the above judgment.

*Byles*, Serjt., in *Hilary* term last, obtained a rule nisi to discharge the defendant out of custody, on the ground that the demand in respect of which he was arrested was a debt provable under the *fiat*.

*Channell*, Serjt., in *Trinity* term, shewed cause. The claim for which this action was brought, and the judgment recovered, was for unliquidated damages, and therefore was not a claim or demand made provable by the 6 G. 4. c. 16. s. 121. The amount of freight payable under the charter-party would depend upon a variety of circumstances, that could only be ascertained by the intervention of a jury. [*Maule*, J. The freight is not payable with reference to the tonnage of the vessel, but only upon the quantity of cargo brought home.] Besides, something was to be done by the plaintiffs. In *Green v. Bicknell* (a), in a special case, it was stated, that, by contract between B. and G., the latter had agreed to sell to the former all the oil which should arrive by a certain ship, which B. was to receive within fourteen days after the landing of the cargo, and pay for, at the expiration of that time, by bills or money, at a specified price per tun, with customary allowances; that the ship arrived, and the cargo was landed, and G. tendered the oil to B. at the end of the fourteen days; that the quantity of oil, after allowances, &c., was a certain number of tuns stated in the case; that, at the time of the tender, the market price of oil was lower than the contract price, by an amount stated; that B., on the tender being made, refused to accept; and that the difference of prices was within the knowledge of the

(a) 8 Ad. & E. 701., 3 N. & P. 684.



parties: it was held, that, *B.* having become bankrupt after the refusal, *G.* could not prove for this breach of contract under the commission; for, that, although *G.*'s claim would be measured by the difference between the contract and market prices at the time when *B.* should have fulfilled his contract, yet the case did not shew that the data on which the calculation must proceed were so settled as to admit of no dispute, and render the intervention of a jury unnecessary; and, consequently, that the claim of *G.* was not for a debt, but for damages. Lord *Denman*, in delivering the judgment of the court, there said: "In many cases in Chancery, proof has been admitted of the value of stock agreed to be transferred at a given day. Most of them are cases of loans of stock; but there is one instance of allowing the value of a sum of stock to be proved, which was covenanted to be transferred by a marriage settlement. (*a*) We were strongly pressed with these authorities, as establishing the principle that any right to recover money, or money's worth, may be treated as a debt, when its amount may be fixed by calculation. But we think that those cases must be regarded as exceptions to the rule, which is, generally speaking, that no claim of this nature shall be provable as a debt, for which the intervention of a jury is necessary. That it was so here, is undeniable; for, every one of the data which form the basis of the calculation, may be denied and disputed, and is the subject of opinion rather than direct decision of facts. And, although the case finds the quantity of the oil, and that it was of merchantable quality, and that customary allowances were offered to be made, and what was the market price of oil of that quality at the time of refusal, and that such price was in the knowledge of all the parties, yet it does not find that any settlement was

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(*a*) *Ex parte Campbell*, 16 *Ves. jun.* 244.



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made, or account agreed to, by the bankrupts, nor any thing which would have precluded them from disputing every one of those facts before a jury : on the contrary, it states that the bankrupts positively refused to accept or pay for the oil, and no reason is assigned for their so doing. For these reasons, we are of opinion that the sum claimed is not a debt, but damages, and cannot be proved." *Parker v. Ramsbottom* (a) and *Ex parte Moffatt, in re Tate* (b), will probably be relied on for the defendant. The former was a case relating to a transfer of stock ; which, as Lord Denman observes, in *Green v. Bicknell*, stands upon a totally different footing. *Ex parte Moffatt* is also distinguishable. By the custom of the tea trade, when teas are sold at a given prompt, or future day of payment, the buyer pays a deposit in part of the purchase-money, and the vendor retains the teas, or the warrants representing them, until the day of prompt, when, if he fails to pay the balance of the purchase-money, the vendor is at liberty to resell the teas, and to charge the purchaser with any deficiency, together with interest from the prompt day, warehouse rent &c. : it was held by the court of review, that, where the vendee became bankrupt before the day of prompt, and the assignees refused to take the teas, or pay the balance of the purchase-money, the vendor might resell them, and prove for the amount of the deficiency. Sir John Cross said : " There is a great distinction between this case and that of *Green v. Bicknell* ; in that case, there was no part of the contract extending to liberty for the vendor to resell, upon default. That appears to me to make all the difference ; for, here, the power to resell forms part of the original contract. The usage of the trade is a mere question of fact ; it

(a) 3 B. & C. 257., 5 D. &  
 R. 138.

(b) 1 Mont. D. & De G.  
 282.



has been sworn to by two witnesses, and not denied; we must, therefore, take it as if the usage was engrafted into the contract; which would consequently stand thus:—a deposit of part of the purchase-money to be paid, and the remainder on a particular day; but, if default should be made in paying the residue on that day, then the vendor to be at liberty to resell, and charge the purchaser with the difference, including interest, warehouse room, &c. Now, all these are ascertainable sums; for, ‘*id certum est, quod certum reddi potest.*’ I have no difficulty, therefore, in saying that the petitioners had a right to sell the goods, and to make their proof for the difference.” *Ex parte Harrison, in re Gales (a)*, is to the same effect. There, the debt was of an ascertained amount, though subject to be reduced upon a certain contingency. Here, the *fiat* having issued before interlocutory judgment, though after the commencement of the action, the case is not aided by the fifty-eighth section of the 6 G. 4. c. 14. (b) In *Ex parte Poucher, in re Cable (c)*, it was held, that, where, in an action upon contract, the verdict is before and the judgment after the bankruptcy, the costs are provable; but, if the verdict as well as the judgment be after the bankruptcy, the costs are not provable, though it seems they are barred by the certificate.

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*Byles*, Serjt., in support of his rule. The demand in question was clearly provable. The forty-seventh sec-

(a) 3 *Mont. D. & De G.* 350.  
(b) Which enacts, that, “if plaintiff in any action at law or suit in equity, or petition for bankruptcy or lunacy, shall have obtained any judgment, decree, or order against any person who shall thereafter become bankrupt, for any debt or demand in respect of which

such plaintiff or petitioner shall prove under the commission, such plaintiff or petitioner shall also be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy.”

(c) 1 *Glyn & J.* 385.



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tion of the 6 G. 4. c. 16. enacts that "every person to whom any bankrupt shall have really and *bonâ fide* contracted any debt or demand before the issuing of a commission against him, shall, notwithstanding a prior act of bankruptcy committed by such bankrupt, be admitted to prove the same, and be a creditor under such commission, as if no such act of bankruptcy had been committed, provided such person had not, at the time the same was contracted, notice of any act of bankruptcy by such bankrupt committed." Some sense must be given to the word "demand." In *Johnson v. Spiller* (a), Buller, J., says: "It is not to be taken for granted that a demand in trover cannot be proved under a commission of bankruptcy; where the demand can be liquidated, it may. It is only personal damages, as, for an assault, &c., that cannot be proved." [Crawwell, J. That doctrine was disapproved of in *Parker v. Norton* (b), where Lord Kenyon said: "I understand Mr. J. Buller, in using the words attributed to him, to have meant only this, that, if a person has his election of two remedies, and may either bring trover or any other action, the possibility of his electing to bring trover shall not prevent his proving his debt under a commission of bankruptcy, if he will waive the necessity for the intervention of a jury to ascertain the amount, cannot be the true test. In *Utterson v. Norton* (c), Buller, J., says: "The rule is this: if a creditor wish to prove a debt under a commission of bankruptcy, it is necessary that he should be able to ascertain the amount of it without the intervention of a jury; and, if it be so certain that he can swear to the amount, he is entitled to prove it under the commission."

(a) 1 Dougl. 168. n.  
 (b) 6 T. R. 699.

(c) 3 T. R.



ough the decision in that case was subsequently reversed (a), the propriety of that *dictum* is not brought in question. [Cresswell, J. It would be difficult to say that the demand in this case was such that the plaintiffs should have sworn to it.] The burthen of the vessel being ascertained, there could be no difficulty in coming to the amount of freight. [Cresswell, J. It is not a complicated matter of computation.] In *Ex parte Day* (b), where the obligor in a bond given upon a loan of stock, to secure a retransfer, and the dividends in the meantime, becoming a bankrupt after the day mentioned in the condition, proof was admitted for the amount of the dividends due before the bankruptcy, and the value of the stock at the date of the commission, by analogy to the case of annuities. So, in *Ex parte Campbell* (d), the value of stock covenanted to be transferred by a marriage settlement, was allowed to be proved. If the form of action would make any difference, debt might have been brought upon this charter-party, though not under seal, and though the damages are not liquidated. The criterion suggested in *Green v. Bicknell* clearly cannot be sustained to its full extent. In *Lane v. Burghart* (d), the defendant, against whom a fiat of bankruptcy issued on the 19th of April, 1839, and who obtained his certificate on the 6th of August, 1839, gave the following undertaking to the plaintiff on the 17th of November, 1838:—“In consideration of your discharging B. out of custody (who had been taken under *ex. sa.* at the suit of the plaintiff), I undertake *he* shall pay the debt due to you, by four instalments, the first to be paid on the 17th of May, 1839.” On this B. was discharged: and it was held that the defendant’s

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(a) See 4 T. R. 570.

(b) 7 Ves. jun. 301.

(c) 16 Ves. jun. 244.

(d) 1 Q. B. 938., 1 Gale &amp;

D. 311. And see *Lane v. Burghart*, 3 M. & G. 597., 4 Scott, N. R. 287.



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tion of the 6 G. 4. c. 16. enacts that "every person with whom any bankrupt shall have really and *bonâ fide* contracted any debt or demand before the issuing the commission against him, shall, notwithstanding any prior act of bankruptcy committed by such bankrupt, be admitted to prove the same, and be a creditor under such commission, as if no such act of bankruptcy had been committed, provided such person had not, at the time the same was contracted, notice of any act of bankruptcy by such bankrupt committed." Some sense must be given to the word "demand." In *Johnson v. Spiller* (a), *Buller, J.*, says: "It is not to be taken for granted that a demand in trover cannot be proved under a commission of bankruptcy; where the demand can be liquidated, it may. It is only personal damage, as, for an assault, &c., that cannot be proved." [*Cresswell, J.* That doctrine was disapproved of in *Parker v. Norton* (b), where Lord *Kenyon* said: "I understand Mr. J. *Buller*, in using the words attributed to him, to have meant only this, that, if a person has his election of two remedies, and may either bring trover or any other action, the possibility of his electing to bring trover shall not prevent his proving his debt under the commission of bankruptcy, if he will waive the tort; and I assent to the proposition so qualified."] The necessity for the intervention of a jury to ascertain the amount, cannot be the true test. In *Utterson v. Vernon* (c), *Buller, J.*, says: "The rule is this: if the creditor wish to prove a debt under a commission of bankruptcy, it is necessary that he should be able to ascertain the amount of it without the intervention of a jury; and, if it be so certain that he can swear to it, he is entitled to prove it under the commission." And

(a) 1 *Doughl.* 168. n.  
 (b) 6 *T. R.* 699.

(c) 3 *T. R.* 539.



though the decision in that case was subsequently reversed (a), the propriety of that *dictum* is not brought in question. [Cresswell, J. It would be difficult to say that the demand in this case was such that the plaintiffs could have sworn to it.] The burthen of the vessel being ascertained, there could be no difficulty in computing the amount of freight. [Cresswell, J. It is not a simple matter of computation.] In *Ex parte Day* (b), the obligor in a bond given upon a loan of stock, to secure a retransfer, and the dividends in the meantime, becoming a bankrupt after the day mentioned in the condition, proof was admitted for the amount of the dividends due before the bankruptcy, and the value of the stock at the date of the commission, by analogy to the case of annuities. So, in *Ex parte Campbell* (d), the value of stock covenanted to be transferred by a marriage settlement, was allowed to be proved. If the form of action would make any difference, debt might have been brought upon this charter-party, though not under seal, and though the damages are not liquidated. The criterion suggested in *Green v. Bicknell* clearly cannot be sustained to its full extent. In *Lane v. Burghart* (d), the defendant, against whom a *fiat* of bankruptcy issued on the 19th of April, 1839, and who obtained his certificate on the 6th of August, 1839, gave the following undertaking to the plaintiff on the 17th of November, 1838:—"In consideration of your discharging B. out of custody (who had been taken under a *cr. sc.* at the suit of the plaintiff), I undertake *he* shall pay the debt due to you, by four instalments, the first to be paid on the 17th of May, 1839." On this B. was discharged: and it was held that the defendant's

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(a) See 4 T. R. 570.

(b) 7 Ves. jun. 301.

(c) 16 Ves. jun. 244.

(d) 1 Q. B. 933., 1 Gale &amp;

D. 311. And see *Lane v. Burghart*, 3 M. & G. 597., 4 Scott, N. R. 287.



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certificate was a bar to the first two instalments, because, *B.* having been discharged from the debt, this was an original undertaking on his part to pay by the hand of *B.* In this case, the certificate became operative only on [the 8th of *January*, 1846, when the suspension ceased. The judgment was signed on the 1st of *July*, 1845, and therefore it was a debt provable by virtue of the 5 & 6 *Vict. c. 122. s. 39.* [*Maule, J.* Final judgment was not signed until after the allowance of the certificate. The only question is, whether the debt was a provable debt.]

*Cur. adv. vult.*

COLTMAN, J., now delivered the judgment of the court.

In this case, the defendant, who had been arrested on a *ca. sa.*, obtained a rule to shew cause why he should not be discharged out of custody, on the ground that he had become bankrupt and obtained his certificate, and that the plaintiffs' demand was proveable under the *fiat*. It appeared by the affidavits, that, on the 13th of *July*, 1844, a charter-party was entered into by the plaintiff and defendant, whereby it was agreed that the ship *Robert*, of the burthen of 310 tons or thereabouts, should proceed forthwith to *Ichaboe* or *Round Island*, and there take in from the defendant a full cargo of guano, or other merchandise, and, being therewith laden, should return to *Liverpool*, and discharge her cargo, for which the defendant agreed to pay freight at the rate of 4*l.* 10*s.* for every ton, of 20 cwt., delivered; and the defendant agreed to provide a full cargo, and put it on board at his own expense: and the parties mutually bound themselves, in the penalty of 1800*l.*, for the due performance of the contract.

The ship sailed to *Ichaboe*, and remained there the stipulated time; but the defendant did not provide any



cargo. An action was commenced by the plaintiffs against the defendant before the issuing of the *fiat* hereafter mentioned, in which the plaintiffs declared in their first count specially on the charter-party, and claimed damages for the breach of contract by the defendant, in not providing a cargo. A count was added, for the hire and use of the vessel. Interlocutory judgment was signed for want of a plea; and on the 16th of *November*, 1845, a writ of inquiry was executed, and the damages assessed at 1644*l.* 3*s.* 9*d.* Final judgment was signed on the 8th of *December*.

On the 16th of *May*, 1845, a *fiat* issued, under which the defendant was declared a bankrupt; and, on the 22nd of *August*, his certificate of conformity was allowed, subject to a suspension thereof for six months from the 1st of *July* then last.

On the 3rd of *February*, 1846, on a *ca. sa.* issued by the plaintiffs, the defendant was arrested.

The question was argued in last *Trinity* term, when several points were urged in support of the rule: — First, that the claim in the action was a debt the amount of which was capable of being ascertained without the aid of a jury; that, when the ship returned without any cargo put on board by the defendant, an action of debt might have been maintained against him for the penalty; and, at all events, that the debt was provable, judgment having been obtained before the allowance of the certificate, which could not be considered as allowed until the period for which it was suspended had expired — in which the 5 & 6 *Vict. c. 122. s. 39.* was referred to.

The case stood over for consideration; and my brothers *Maule* and *Cresswell* and I, before whom it was argued, are now of opinion that the rule must be discharged. And, first, as to the argument founded on the clause in the charter-party whereby each was bound for the due performance of it in the penal sum of 1800*l.*;

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it is clear that the plaintiffs could not on that account have proved either the sum of 1800*l.* or any other sum as a debt due to them, the penalty not being introduced as a measure of damages, or liquidated sum, to be paid in the event of a breach of the charter-party: *Goddard v. Vanderhyden*. (a) Nor can the defendant derive any benefit from the argument founded on the suspension of the certificate until after final judgment was signed; for, either the sum recovered was a debt which existed before the action was commenced, and before the bankruptcy, or it was a sum awarded for damages which were before unliquidated; in which case, the assessment of the amount of damages cannot be proved.

The real question, therefore, is, whether the sum recovered in the action, can be considered as a debt existing before the commencement of the action. The cases of *Johnson v. Spiller* (b) and *Parker v. Norton* (c), which were cited in support of the rule, were very different from the present. The first was an action for money had and received; and Lord Mansfield decided that the claim might have been proved, because the defendant might have been sued for money had and received before his bankruptcy. *Parker v. Norton* was an action of trover; and the court held that it was not barred by the bankruptcy and certificate of the defendant, although the conversion was before the bankruptcy, and the plaintiff might, had he so elected, have waived the tort, and proved his claim under the commission as a debt. And the effect of the dictum of Buller, J., in *Johnson v. Spiller*, that a party may prove a demand in trover, where the amount can be liquidated, was explained to mean, not that the party must prove, but

(a) 3 Wils. 270.  
(b) 1 Doug. 167.

(c) 6 T. R. 695.



here he has a right to sue in trover, or, waiving the right, to sue in assumpsit for a liquidated demand, he may prove it. The cases relating to contracts to replace stock appear to rest on the same principle as *Johnson v. Miller*, viz. that, where the day for replacing it has passed before the bankruptcy, so much of the money produced by the original sale as would have been necessary to replace it on the day appointed, may be considered as money had and received to the use of the party lending the stock, and it is therefore a debt, ascertained at the time of the bankruptcy: on the other hand, where a contract has been broken, and the demand thereupon arising is not a debt, but damages, the amount of which may depend on various circumstances, and which it is necessary that a jury should estimate, unless they are ascertained before the issuing of a *fiat*, they cannot be proved. That point was very fully discussed and considered in the recent case of *Green v. Bicknell*. (a) That was a contract by the plaintiffs to sell to the defendant all the oil that should arrive by a certain vessel, at a certain price, and by the defendant to accept and pay for it. The ship arrived, and the oil was tendered before the defendant became bankrupt; but he did not accept or pay for it: and the court held that the demand of the plaintiffs in respect of that breach of contract, was not provable under the *fiat*, although that demand was to be ascertained by the application of a well-established principle. So, here, the vessel went to *Ichaboe* in pursuance of the charter, and the defendant failed to provide a cargo according to his contract. That failure was before his bankruptcy; and he thereupon became liable to pay such damages as resulted to the plaintiff from that breach. But the amount was unliquidated.

If, indeed, the contract had been, to pay a certain

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(a) 8 *Ad. & E.* 701., 3 *N. & P.* 634.



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gross sum for the voyage, or a sum regulated by the tonnage of the vessel, as soon as the voyage was completed, that sum would have been a debt. Such, however, was not the bargain. The defendant contracted to pay a certain sum for each ton of guano delivered and to enable the plaintiff to earn freight for as many tons as the ship could carry. The demand in respect of freight for any cargo actually brought home would be a debt; but the demand in respect of the defendant's breach of his contract to enable the plaintiffs to earn freight, is for damages only; and any sum actually earned by the plaintiffs by bringing home a cargo for other persons, or employing the ship in any other way, would have to be taken into account in estimating those damages.

It appears to us, therefore, that that was, properly speaking, a demand for unliquidated damages, which could not be proved under the *fiat*; and, consequently, that the defendant is not protected by his certificate, or entitled to be discharged out of custody.

This is to be considered as the judgment of my brothers *Maule* and *Cresswell* and myself; the late lord chief justice not having intimated any opinion.

Rule discharged.



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PANNELL v. Sir JOHN BARKER MILL, Bart., and  
HENRY POWELL.

Nov. 19.

**TRESPASS**, for breaking and entering two closes of the plaintiff, situate in the parish of *Milbrook*, in the county of *Southampton*, respectively called the *Orchard* and *Hill Pasture*, and treading down, &c., the strawberries, &c., there then growing, &c.

Third plea — as to all the trespasses in the declaration mentioned, except as to subverting and spoiling the earth and soil of the said several closes — that, long before the several times when &c., or any of them, Sir *Charles Mill*, Bart., was seised, in his demesne as of fee, of and in, amongst other things, the said closes in which &c., and also of the lordship and manor of *Milbrook*, of the demesne lands of which manor the said several closes in which &c. then were, and still are, part; that, being so seised, he afterwards, to wit, on the 4th of *June*, 1829, duly made and published his last will and testament in writing, &c., and thereby, amongst other things, gave and devised the said several closes in which &c., with the appurtenances, and also the said

In trespass for breaking and entering the closes of *A.*, (the plaintiff,) it was pleaded that *B.*, (the defendant,) being seised in fee of the closes, and of the manor of *M.*, whereof the closes were parcel, demised the closes to *C.* for ninety-nine years; and that, afterwards, by indenture made between *B.* of the one part, and *C.* of the other part, *C.* granted to the defendant

the sole and exclusive right to pursue, kill, and take all birds of warren at any time during the term in and upon the closes, together with free liberty to enter the closes, and therein to pursue, kill, and take the birds of warren in and upon the same, at any time, at his free will and pleasure; and so justified entering upon the closes for the purpose of pursuing therein birds of warren. *A.* cravedoyer of the indenture, and demurred to the plea. The indenture appeared to be a demise of the closes by *B.* to *C.*, “except, and always reserved out of that demise unto *B.*, &c., all timber trees, &c., and also except and reserved all royalties whatsoever to the premises belonging or in any wise appertaining:” —

*Semble*, that this clause created an exception or reservation, and was not properly pleadable as a grant.

But, held, that, at all events, it did not amount to a grant by *C.* of a liberty to *B.* to enter upon the closes for the purpose of pursuing, killing, and taking birds of warren.



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lordship and manor of *Milbrook*, with the appurtenances, to the defendant Sir *J. B. Mill*, for the term of his natural life; and also by his said will gave to the said Sir *J. B. Mill* power and authority to grant leases of the said several closes in which &c.: that the said Sir *Charles Mill* afterwards, and before the said several times when &c., or any of them, to wit, on the 26th of *February*, 1835, died so seised of and in the said several closes in which &c., with the appurtenances, as aforesaid, and of the said lordship and manor of *Milbrook*, with the appurtenances, without altering his said will as to the said devise of the said several closes in which &c., to the defendant Sir *J. B. Mill*; whereupon and whereby the said Sir *J. B. Mill* then became and was and continued seised in his demesne as of freehold for the term of his natural life, of and in the said several closes in which &c., with the appurtenances, and of and in the said lordship and manor of *Milbrook*, with the appurtenances: that thereupon afterwards, and before the said several times when &c., or any of them, to wit, on the 28th of *July*, 1845, he the said Sir *J. B. Mill*, being seised in his demesne as of freehold for the term of his natural life of and in the said several closes in which &c., with the appurtenances, and of and in the said lordship and manor of *Milbrook*, with the appurtenances, did, under and by virtue of the estate and interest of him the said Sir *J. B. Mill* in the said several closes in which &c., with the appurtenances, and also under and by virtue of the power and authority given to him by the said will of the said Sir *C. Mill* in that behalf, grant and demise unto *Charles Bridger*, his executors, &c., amongst other things, the said several closes in the declaration mentioned, to have and to hold the same unto him the said *Charles Bridger*, his executors, &c., from thenceforth for and during the term of ninety-nine years, if *Capron Bridger*, *Osmer Bridger*,



and *Arthur Bridger*, or any or either of them, should so long live: that afterwards, to wit, on the said 28th of *July*, 1845, the said *Charles Bridger* entered and took possession of the said several closes in which &c., as tenant to the said *Sir J. B. Mill*, under and by virtue of the last-mentioned grant and demise: that afterwards, to wit, on &c. last aforesaid, by a certain indenture then made by and between the said *Sir J. B. Mill* of the one part, and the said *Charles Bridger* of the other part — profert — the said *Charles Bridger* did, amongst other things, grant unto the said *Sir J. B. Mill* and other the person or persons for the time being entitled in reversion or remainder immediately expectant upon the determination of the term so granted by the said *Sir J. B. Mill* as above in this plea mentioned, the sole and exclusive right to pursue, kill, and take all birds of warren at any time during the said term being in and upon the said several closes, or any of them, together with free liberty for himself, themselves, and his and their servants, to enter into and upon the said several closes in which &c., or any part thereof, and therein to pursue, kill, and take the birds of warren in and upon the same, at any time, at his and their free will and pleasure: that afterwards and during the continuance of the said demise from the said *Sir J. B. Mill*, to the said *Charles Bridger*, and of the term aforesaid, and whilst the said *Capron Bridger*, *Osmer Bridger*, and *Arthur Bridger* were, and each of them was, in full life, and at the said several times when &c., the said several times being, and each of them being, at proper seasons of the year in that behalf, he the said *Sir J. B. Mill*, under and by virtue of the said grant, and in exercise of the said several rights so conferred thereby as aforesaid, and the said *Henry Powell*, as his servant, and by his command, did enter into and upon the said several closes in the declaration mentioned, for the purpose of pur-

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suing and killing and taking thereon, and did pursue, kill, and take therein, divers, to wit, ten birds of warren, to wit, partridges, and in so doing did unavoidably a little tread down, crush, and injure the produce, grass, and herbage of the plaintiff then there growing and being, doing no unnecessary damage to the same, as they lawfully might for the cause aforesaid ; which were the several trespasses in the introductory part of the plea mentioned — verification, and prayer of judgment, if &c.

The plaintiff cravedoyer of the indenture in the third plea mentioned, and demurred generally—the point intended to be relied on in support of the demurrer, being, that the deed, as set out onoyer, does not shew the grant alleged in the plea.

The indenture in question was an indenture of lease, whereby the defendant *Sir J. B. Mill* granted, demised, limited, and appointed unto *Charles Bridger*, his executors, administrators, and assigns, certain premises therein described, and alleged to be situate in the manor and parish of *Milbrook*, in the county of *Southampton*, “together with all ways, paths, passages, waters, watercourses, easements, emoluments, profits, advantages, and appurtenances whatsoever to the said demised premises belonging or appertaining (except and always reserved out of this demise, unto the said *Sir J. B. Mill*, and other the person or persons for the time being entitled to the said premises hereby demised, in reversion or remainder immediately expectant upon the determination of the term hereby granted, all timber trees and trees likely to become or fit for timber, with the tops and boughs thereof, and the bodies of all pollards now or hereafter standing, growing, or being upon the said demised premises, or any part thereof, with full and free liberty for the persons or person who under the limitations of the aforesaid will, may, for the time being, be entitled in that behalf, and all others by



them or him duly authorized, but not further or otherwise, at all times to fell, cut, take, and carry away the same at his or their will and pleasure; *and also except and reserved all royalties whatsoever to the said premises belonging, or in any wise appertaining*):” *habendum*, for ninety-nine years, if *Capron Bridger, Osmer Bridger, and Arthur Bridger*, children of the said *Charles Bridger*, or any or either of them, should so long live, &c. The indenture also contained the following amongst other covenants: — “And also that it shall and may be lawful to and for the said *Sir J. B. Mill*, and his assigns, and other the person or persons for the time being entitled as aforesaid, from time to time during the continuance of this demise, to commence and prosecute any action or actions, or lay information, in the name or names of him the said *Charles Bridger*, his executors, administrators, and assigns, or his or their tenants, being occupiers of the said demised premises, or any part thereof, against all and every person or persons who shall trespass on any of the lands hereby demised, for the purpose or by means of hunting, coursing, shooting, or sporting thereon, he the said *Sir J. B. Mill*, his heirs and assigns, or other the person or persons for the time being entitled as aforesaid, bearing and paying all the costs and expenses attending every such action, prosecution, or information, and indemnifying the said *Charles Bridger*, his executors, administrators, and assigns, or his or their tenants as aforesaid, and every of them, therefrom.”

Joinder in demurrer.

*Channell*, Serjt. (with whom was *Barstow*), in support of the demurrer. The words of exception in the lease to *Bridger* do not confer the licence or authority claimed by the plea, which, to be an answer to the action, must shew, not only an exclusive right to the game, but also

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a right to enter upon the plaintiff's land for the purpose of pursuing and killing it. The words are, "except and reserved all *royalties* whatsoever to the said premises belonging, or in any wise appertaining." Assuming "royalties" to be tantamount to "free warren," it would be free warren appendant or appurtenant; and there is no allegation in the plea that there was any free warren appendant or appurtenant. In *Bowlston v. Hardy* (a), the crown granted a manor to Sir *William Peto*; and granted to him to have warren in the same manor; and the court held this to be a warren in gross, which would not pass by a grant of the manor, and all warrens thereto appertaining, or accepted and reputed as part of that manor. That case is followed by *Morris v. Dimes* (b), where, in trespass, the defendant pleaded a grant by the King, of free warren in land of which he was seised in fee, to *P.* and deduced title from *P.* to *F.*, and pleaded a conveyance by *F.* of the said free warren to the defendant: and it was held that this was a grant of free warren in gross, and that the plea was not sustained by proof of a conveyance by *F.* of a manor, of which the land in question was copyhold, with all and singular fisheries and right of fishing, fowling, hawking, hunting, and shooting, and all profits, *royalties*, &c., and all other rights, liberties, franchises, jurisdictions, privileges, commodities, advantages, hereditaments, and appurtenances whatsoever to the said manor belonging, or in any wise appertaining thereto, or at any time occupied or enjoyed therewith, or reputed part, parcel, or member thereof, or granted by the King to *P.* as appurtenant to the manor;—and this, though it was shown that the King, at the time of the grant to *P.* was lord of the manor, and held certain demesne lands in fee, and granted the free warren in both the demesne and the other lands of the manor.

(a) *Cro. Eliz.* 547.(b) 1 *Ad. & E.* 654.



Assuming, therefore, that this exception amounts to a grant of free warren, it is a grant of free warren in gross; which will not sustain the plea. The case of *Pickering v. Noyes* (a), however, is an authority to show that the words of reservation here do not amount to a grant of free warren.

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Sir T. Wilde, Serjt. (with whom were Manning Serjt. and Fitzherbert), *contra*. The case of *Pickering v. Noyes* does not touch the present. All that was decided there was, that the deed produced in evidence did not sustain the fifth plea. Here, the question is, what was the intention of the parties, and whether it can be carried into effect by the operation of the exception of all royalties, as a grant of free warren appendant or appurtenant. A right of free warren is properly described by the word royalties: *Keble v. Hickringill* (b); 22 & 23 Car. 2. c. 25. s. 2; 4 & 5 W. & M. c. 23. s. 4. There are many authorities to show that the words of a grant are not to be taken in their strictly legal sense, without regard to the intention of the parties. In *Parkhurst v. Smith d. Dormer* (c), Willes, C. J., says: "It is a known maxim in law, that, *benigné faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat*. There is another, that, *verba intentioni, et non e contra, debent inservire*. It is said in our books, that the construction of deeds ought to be favourable, and as near to the apparent intent of the parties as possibly may be, and as the law will permit. That too much regard is not to be had to the natural and proper signification of words and sentences to prevent the simple intention of the parties from taking effect; for, that the law is not nice in grants, and therefore it doth often transpose

(a) 4 B. & C. 639., 7 D. &  
R. 49.

(b) 11 Mod. 74, 131.  
(c) Willes, 327.



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words contrary to their order, to bring them to the intent of the parties." And in *Hill v. Grange* (a), it was agreed "that the word, *appertaining* to the messuage, shall be taken in the sense of *usually occupied* with the messuage, or *lying to* the messuage; for, when appertaining is placed with the said other words, it cannot have its proper signification, and therefore it shall have such signification as was intended between the parties, or else it shall be void, which it must not be by any means; for, it is commonly used in the sense of *occupied with*, or *lying to*, *ut supra*, and, being placed with the said other words, it cannot be taken in any other sense, nor can it have any other meaning than is agreeable with law; and, forasmuch as it is commonly used in that sense, it is the office of the judges to take and expound the words which common people use to express their meaning according to their meaning; and therefore it shall be here taken, not according to the true definition of it, because that does not stand with the matter, but in such sense as the party intended it." So, in *Devaux v. J'Anson* (b), the word "freight" received an interpretation different from its ordinary and strict sense, in order to give effect to the intention of the parties. Many cases to the same purport are cited in *Hinchliffe v. Lord Kinnoul*. (c) It is by no means unusual to reserve a right of sporting in this way. [Tindal, C. J. Would minerals be excepted by the word "royalties?"] The import of the word might be restrained by the other words of the deed. [Tindal, C. J. You would exclude the tenant from sporting. Nothing short of a grant of free warren would do that.] Probably not. [Maule, J. You certainly would not give full effect to the exception, unless you so construed

(a) *Plowden*, 170.

(b) 5 *N. C.* 519., 7 *Scott*, 507.

(c) 6 *Scott*, 650.



That a reservation or exception like this is pleaded as a grant, is clear from the cases of *The Durham Sunderland Railway Company v. Walker* (a) and *Ham v. Hawker*. (b)

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Pannell, Serjt., in reply. In *The Durham and Sunderland Railway Company v. Walker*, the words of reservation were held to constitute not properly an exception, to give the lessors an easement newly created by grant from the lessee. So also, in *Doe d. Douglas* (c), a reservation and exception of the liberty of king, hunting, fishing, and fowling, was held to be properly an exception or reservation, but a privileged one. [Maule, J. You must show that it is impossible, in any state of circumstances, that the deed can support the plea as a grant.] In *Barlow v. Rhodes* (d), where one seised in fee of premises, and of the soil over which a way, not of necessity, has been used by the owner of them, grants those premises, “with all ways, rights, &c., to the same belonging, or in any wise appertaining,” no way will pass unless legally appurtenant, or as it appears from the grant itself that the parties intended to use the word in a sense more extended than the legal one. *Pickering v. Noyes* is a distinct authority to show that “royalties” will not include “free warren.”

*Cur. adv. vult.*

BOLTMAN, J., now delivered the judgment of the court.

In this case, which was argued before the late Lord of Justice Tindal, my brothers Maule and Cresswell, and myself, was an action of trespass, for breaking and

(a) 2 Q. B. 940.

(b) 7 M. & W. 63.

(c) 2 Ad. & E. 705.

(d) 3 Tyrwh. 280., 1 C. & M. 439.



appurtenances, and also the manor of *Mill* the appurtenances, to the defendant, *Sir Jo Mill*, for life; and, by his will, gave the said *Barker Mill* power to grant leases of the said which &c., and died seised; whereupon *Sir Jo Mill* became and was, and still was seised mesne as of freehold, for life, of and in the which &c., with the appurtenances, and of the *Milbrook*, with the appurtenances; and that *Barker Mill*, under and by virtue of his estate in the said closes in which &c., and by virtue of the power given him by the *Charles Mill*, granted and demised to *Charles* his executors, administrators, and assigns, several closes in the declaration mentioned, for nine years, if *Capron Bridger*, *Osmer Bridger*, or *Bridger*, or any or either of them, should so that *Charles Bridger* entered; and that, after an indenture made between *Sir John Barker* on one part, and *Charles Bridger* of the other part, *Charles Bridger* granted to *Sir John Barker* other the person or persons for the time being in reversion or remainder immediately expected the determination of the term so granted as mentioned, the sole and exclusive right to pursue take all birds of warren, at any time during



which &c., or any part thereof, and therein to pursue, kill, and take the birds of warren in and upon the same, at any time, at his and their free will and pleasure: and so justified entering upon the said closes for the purpose of pursuing therein birds of warren.

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The plaintiff craved oyer of the indenture. By that indenture, made between Sir *John Barker Mill* of the one part, and *Charles Bridger* of the other part, Sir *John Barker Mill*, for the considerations therein mentioned, granted, demised, limited, and appointed to *Charles Bridger*, his executors, administrators, and assigns, divers lands and tenements therein particularly mentioned, then in the tenure of *John Pannell*, "except and always reserved out of the demise, to Sir *John Barker Mill*, and other the person or persons for the time being entitled to the said premises thereby demised, in reversion or remainder immediately expectant upon the determination of the term thereby granted, all timber trees and trees likely to become or fit for timber, with the lops and boughs thereof, and the bodies of all pollards standing, growing, and being upon the said demised premises, or any part thereof, with full and free liberty for all the persons or person who, under the limitations of the will of Sir *Charles Mill*, might, for the time being, be entitled in that behalf, and all others by them or him duly authorized, but not further or otherwise, at all times to fell and take and carry away the same, at his or their will and pleasure; and also except and reserved all royalties whatsoever to the said premises belonging, or in any wise appertaining, to have and to hold the demised premises, with their appurtenances (except as before excepted), for ninety-nine years, if *Capron Bridger*, *Omer Bridger*, and *Arthur Bridger*, or any of them, should so long live, yielding and paying the yearly rent of 3s. 6d. After various provisions not necessary to be specified, is the following proviso, viz. that it shall be



occupiers of the said demised premises, or thereof, against all person or persons who shall on any of the lands thereby demised, for the by means of hunting, coursing, shooting, or thereon; he said Sir *John Barker Mill*, his assigns, or other the person or persons for being entitled as aforesaid, bearing and paying costs and expenses attending every such action, or information, and indemnifying the *Bridger*, his executors, administrators, and his or their tenants, and every of them, thereof.

The deed having been set out on oyer, the demurred to the third plea.

The question arises on these pleadings, whether the indenture which is set out on oyer, does, in law amount to a grant such as is set out in the plea.

On the part of the defendant, the case of *Hawker (a)*, was relied on, to show, that where a conveyance of lands contains the words excepting and reserving to the grantors, their heirs and assigns, the right to come upon the land, and hawk, hunt, fish, &c. as such a liberty cannot amount to an exception, reservation, the clause will operate as a grant in part to the party to whom the land is conveyed. And it is held that the word royalty was a proper description of free warren; for which *Keble v. Hickring*



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the word royalty signified free warren; and, although there can be no grant of a right of free warren by a subject, *ut res magis valeat quam pereat*, it shall be construed to be a grant of a liberty to enter on his land and kill birds of warren. And the case of *Parkhurst v. Smith* (a) was cited, where it is said, that the construction of deeds ought to be favourable, and as near to the apparent intent of the parties as possibly may be, and the law will permit: that too much regard is not to be had to the natural and proper signification of words and sentences, to prevent the simple intention of the parties from taking effect; for, that the law is not nice in grants, and therefore it doth often transpose words contrary to their order, to bring them to the intent of the parties. And *Hill v. Grange* (b) was cited to the same purpose. And it was said, that here there could be no doubt but that the parties intended that Sir *John Barker Mill* and his assigns should have a right to enter on the land for the purpose of sporting, as otherwise the clause authorising him to prosecute trespassers in the name of the tenant, but at his own expense, would be idle; for, no one can be supposed to be willing to incur expense in preserving the game and prosecuting trespassers, unless he had the right of shooting the game when preserved.

The present case, however, is distinguishable from that of *Wickham v. Hawker*, as in that case the clause excepting and reserving the liberty to hunt, &c., could not by possibility operate as an exception or a reservation. In the present case it is not so; for, a royalty may by law be appurtenant to land, as in this very case of warren; a man may have warren in his own land, or in that of another man, by prescription: *Bro. Abr. tit. Warren*, pl. 2. And in the case of *Bowlston v. Hardy* (c),

(a) *Willes*, 332.(b) *Plowd.* 170.(c) *Cro. Elix.* 547.



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it is said, a warren is not parcel nor any member of a manor, but it may be appertaining, but that is by prescription. And it is said in *Dyer* (a), and in the Year Book (b), that a man may have warren in the land of another as appendant to his manor; and if the manor is granted *cum pertinentiis*, the warren will pass.

In the case under consideration, the words “except and always reserved, all royalties,” &c., may have their proper effect of creating an exception; and the reason for holding their legal effect to be that of a grant by the grantee of the estate, fails.

But, passing this by, there is another reason why the construction contended for by the defendant ought not to be adopted. It is not enough for the defendant to make out a *possible* intention favourable to his view: he must shew a *reasonable certainty* that the intention is such as he suggests. In the case of *Wickham v. Hunter*, the intention of the parties was clear and express; but in the present case, there is no such clear indication of intention. Mr. *Bridger* might be willing to consent that the name of his tenants should be used to prevent trespasses on his land; and yet, if he had been asked whether he was willing to grant a liberty to Sir *John Barker Mill* and his assigns to sport, at their free will, over the land, he might have refused.

Upon the whole, therefore, we think, that, if we take the words “except, and always reserved, all royalties,” as amounting to an exception, they must be taken to be the words of Sir *John Barker Mill*, not a grant by the grantee, Mr. *Bridger*. If, on the other hand, they cannot be taken to be an exception or reservation, still they cannot be considered as amounting to a grant by Mr. *Bridger* of the liberty of entering on the lands for the

(a) Page 30, n. (209.)

(b) In *Stile v. The Abbot of Tewkesbury*, T. 8 H. 7, fo. 4.

Quære, whether the words are those of *Vavisor*, J., *obiter*, or are those of the reporter.



ose of shooting, unless we could see clearly that  
 was his intention in the words made use of.  
 his is to be considered as the judgment of my brothers  
 le and *Cresswell* and myself; the opinion of the late  
 chief justice not having been declared.

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Judgment for the plaintiff.

In the Matter of HANNAH WOODALL.

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[ANNING, Serjt., moved for an order under the  
 3 & 4 W. 4. c. 74. s. 91., to dispense with the  
 currence of the husband of *Hannah Woodall* in a con-  
 veyance by her of her interest in certain property under  
 will of *Thomas Morgan*, her late father. (a) The  
 affidavit upon which the motion was founded, stated  
 that the husband was in such a state of mental imbecility  
 and bodily infirmity, as to be wholly incapable of exe-  
 cuting any deed. The learned serjeant prayed for a rule  
 being, agreeably to the form in which the conveyance  
 had been prepared,—that the said *Hannah Woodall* should  
 be at liberty, by deed, to dispose of all those two undivided  
 parts of an estate in the parishes of *Llanellen* and  
*moor*, in the county of *Monmouth*, consisting of 134  
 acres or thereabouts, in the said affidavit mentioned,  
 which she is tenant in tail, unto *William Henry*  
*Woodall*, *Mary Ann Richards*, and *Hannah Morgan*  
*and* their heirs, freed, and absolutely dis-  
 charged, of and from all estates-tail in the same parts  
 shares, and all estates to take effect after the deter-  
 mination, or in defeasance, of any such estates-tail; to  
 the use of the said *Hannah Woodall* for the term of  
 her natural life; and from and after the decease of the

The court will  
 not sanction a  
 particular  
 form of con-  
 veyance by a  
 married  
 woman, under  
 the 3 & 4  
 W. 4. c. 74.  
 s. 91.

(a) See *Doe dem. Woodall v. Woodall*, ante, p. 349.



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said *Hannah Woodall*, and subject, and without prejudice, to the estate or interest of the said *William Woodall*, as tenant by the curtesy, in case he shall survive her, to the use of the said *William Henry Woodall*, *Mary Ann Richards*, and *Hannah Morgan Saunders*, in equal shares, as tenants in common, and their respective heirs and assigns for ever, — without the concurrence, &c.

WILDE, C. J. I think it is not desirable that the court should sanction a particular form of conveyance. It is better, in general terms, to give the parties authority to convey. Such general form of rule precludes discussion as to its effect in each particular case.

MAULE, J. I think we ought not to step out of our way to meet the crotchets of conveyancers.

The rest of the court concurring, the rule was framed in the usual way. (a)

(a) The rule was ultimately drawn up and issued in the following form : —

“ In the Common Pleas.

*Michaelmas* Term, in the tenth year of the reign of *Queen Victoria*.

On the behalf of *Hannah Woodall*, the wife of *William Woodall* of *Atergavenny*, in the county of *Monmouth*, minister of the Gospel.

*Thursday*, 12th of *November*.

Upon reading the affidavit of the said *Hannah Woodall*, *W. S.*, *E. Y. S.*, and *T. P.*, and on hearing counsel on behalf of the said *Hannah Woodall*, it is ordered that the said *Hannah Woodall* be at liberty, by deed or surrender, to dispose of, release, surrender, or extinguish all her estate and interest

of and in all those two undivided third parts of an estate in the parishes of *Llanellen* and *Llanover*, in the county of *Monmouth*, consisting of 134 acres or thereabouts, in the said affidavit mentioned, to such person or persons as she may think fit, — without the concurrence of her said husband, it appearing, by the said affidavit, that the said *William Woodall*, in the month of *October* 1843, became, and hath ever since continued, and still is, imbecile in his mind, and wholly incapable of managing, and unable to manage, his affairs, and that he is totally incapacitated from, and incapable of, understanding or comprehending the nature of any written deed or instrument, or transacting or managing any business whatsoever.”



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## BARRY and Another v. NESHAM and LOWTHIN.

Nov. 13.

**A**SSUMPSIT, for goods sold and delivered. The defendant *Nesham* pleaded non assumpsit; the other defendant suffered judgment by default.

*A.*, the proprietor of a newspaper, agreed to sell all the plant of the office to *B.* for 1500*l.*, to be paid, with interest, by instalments running over a period of seven years; *A.* undertaking to guarantee to *B.* during the seven years the clear yearly profit of 150*l.* over and above the annual payments of principal and interest: and *B.*, in consideration of such guarantee, agreed to pay all such surplus profits to *A.* until such surplus profits should amount

The cause came on for trial before *Cresswell*, J., at the sittings in *London* after *Michaelmas* term, 1845, when a verdict was taken for the plaintiff, damages 83*l.* 14*s.* 2*d.*, subject to the opinion of the court upon the following case:—

The plaintiffs carry on business as wholesale stationers, in the city of *London*. The particulars of demand were, for goods sold and delivered, to the amount of 83*l.* 14*s.* 2*d.* between the 6th of *July* and the 31st of *August*, 1844. These goods consisted of newspaper-stamps and paper, which were ordered by and delivered to the defendant *Lowthin*, upon the terms mentioned in the particulars, at the office of a newspaper called "*The Newcastle Advertiser and Commercial Herald*," which was printed and published at No. 89. *Side*, in *Newcastle-upon-Tyne*. All the goods were used by the defendant *Lowthin* in the business of the said newspaper office; copies of the said newspaper having been printed and published upon the said paper.

On the 6th of *October*, 1843, the defendant *Nesham*, being at that time the proprietor of the said newspaper then called "*The Great Northern Advertiser and Com-*

500*l.*, if they should amount to that sum during the seven years; and that, such surplus profits should, during the seven years, amount to 500*l.*, then *B.* should pay,—over and above the purchase-money and interest, and the 500*l.*,—the existing liabilities of the newspaper, not exceeding 250*l.*:—

Held, that *A.* was liable, as a (*quasi*) partner, for the price of goods supplied by *B.*'s order for the use of the newspaper.



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*mercial Herald*"), and of the stock and other things mentioned in the following indenture, sold the said newspaper, stock, and other things to *J. Hoggins, R. Curtice*, and *W. P. Henderson*, who, on the 7th of October in the same year, mortgaged the same newspaper, stock, and other things to the defendant *Nesham*, by an indenture, of which the following is a copy : —

“ This indenture, made the 7th of October, 1843, between *J. Hoggins*, agent, *R. Curtice*, reporter, and *W. P. Henderson*, reporter, all of the borough and county of *Newcastle-upon-Tyne*, of the one part, and *W. Nesham*, of the same place, surgeon, of the other part : Whereas the said *W. Nesham* was lately the proprietor of a certain newspaper published at *Newcastle-upon-Tyne*, called ‘ *The Great Northern Advertiser and Commercial Herald*,’ together with the printing materials, presses, types, office fixtures, and other goods and chattels connected therewith (more particularly described in the schedule hereunder written), and, being so possessed thereof, contracted and agreed with *Hoggins, Curtice*, and *Henderson*, for the absolute sale to them thereof, at or for the price or sum of 1600*l.*, but no part of the said purchase-money has yet been paid : And whereas, on the treaty for the said sale and purchase, it was agreed that *Hoggins, Curtice*, and *Henderson* should pay to *Nesham* their joint and several promissory note, bearing even date herewith, for the said sum of 1600*l.* and interest payable to the order of *Nesham* twelve months after date ; and which said promissory note has been given accordingly : And whereas, for the better securing the payment of the said sum of 1600*l.* and interest, *Hoggins, Curtice*, and *Henderson* have executed a warrant of attorney in writing under their hands and seals, bearing or intending to bear, even date with these presents, in the penal sum of 3200*l.*, with a defeasance thereunder written, for making void the same on payment of the



sum of 1600*l.*, with interest thereon, after the rate of 5*l.* *per centum per annum*, at the times and in manner therein mentioned: And whereas it hath also been agreed, for the further and better securing the due payment of the said sum of 1600*l.* and interest, as aforesaid, that *Hoggins, Curtice, and Henderson* shall likewise execute a bill of sale of the said newspaper, goods, effects, and premises, as hereinafter is expressed: Now, this indenture witnesseth, that, in pursuance of the last-mentioned agreement, and in consideration of the said sum of 1600*l.* so due and owing to *Nesham* by *Hoggins, Curtice, and Henderson*, as aforesaid, they, the said *Hoggins, Curtice, and Henderson*, do, and each of them doth, grant, bargain, and sell unto *Nesham*, his executors, administrators, and assigns, all the copyright, title, and interest of them, *Hoggins, Curtice, and Henderson*, of and in the said newspaper called '*The Great Northern Advertiser and Commercial Herald*;' and also all and singular the printing-materials, presses, type, office furniture, and other the goods, chattels, and effects now in the shop and on the premises in a street called *The Side*, in *Newcastle-upon-Tyne* aforesaid, and mentioned or described in or by the inventory or schedule thereof hereunder written; and all the estate, right, title, &c., of them, *Hoggins, Curtice, and Henderson*, of, in, or to the same, and every of them respectively—to have, hold, take, and enjoy the said newspaper, &c., and all and singular other the premises hereinbefore bargained and sold, or mentioned or intended so to be, with their and every of their rights, members, and appurtenances, unto and by *Nesham*, his executors, administrators, and assigns, to and for his and their own use and benefit; subject, nevertheless, to the proviso for redemption of the said premises hereafter contained; that is to say, provided always, and it

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is hereby agreed between the said parties to these presents, that, if the said *Hoggins, Curtice, and Henderson*, their executors, administrators, or assigns, or any of them, do and shall well and truly pay or cause to be paid unto *Nesham*, or his certain attorney, executors, administrators, or assigns, the sum of 1600*l.* sterling, with interest for the same after the rate of 5*l.* per cent. per annum, at the times and by the instalments hereinafter mentioned, that is to say, 380*l.* on the 21st of *September*, 1844, the further sum of 365*l.* on the 21st of *September*, 1845, the further sum of 350*l.* on the 21st of *September*, 1846, the further sum of 345*l.* on the 21st of *September*, 1847, the further sum of 320*l.* on the 21st of *September*, 1848, and the further sum of 105*l.*, being the balance of the said principal sum of 1600*l.* and interest, on the 21st of *September*, 1849, then and in such case, these presents, and every clause, article, condition, and thing herein contained, shall cease, determine, and be utterly void; otherwise to be and remain in full force, virtue, and effect: And the said *Hoggins, Curtice, and Henderson*, for themselves, their executors and administrators, do hereby covenant, promise, and agree, to and with *Nesham*, his executors, administrators, and assigns, by these presents, in manner following, that is to say, that they, *Hoggins, Curtice, and Henderson*, or some or one of them, or their or some or one of their executors and administrators, shall and will well and truly pay or cause to be paid unto *Nesham*, his executors, administrators, and assigns, the said sum of 1600*l.* and interest, at the times, and in manner, aforesaid, according to the true intent and meaning of these presents: and also, that, if the said *Hoggins, Curtice, and Henderson*, their executors or administrators, shall make default in payment of any of the instalments for or on account of the



sum of 1600*l.* and interest hereinbefore appointed  
 made, or of any part thereof respectively, on any  
 days or times hereinbefore appointed for payment  
 thereof, then the said *Nesham*, his executors, adminis-  
 trators, and assigns, shall and may peaceably and quietly  
 have, hold, and enjoy, to his and their own proper use  
 and behoof for ever, the said newspaper, goods, chattels,  
 effects, and premises by these presents bargained and  
 sold, or otherwise assured, or intended so to be, and  
 every part and parcel thereof, with all and singular the  
 appurtenances, without any lawful let, suit, trouble,  
 vexation, and denial of *Hoggins*, *Curtice*, and *Hen-*  
*son*, their executors, &c., or any other person or  
 persons whatsoever: and also at any time thereafter  
 make sale of the same newspaper, goods, chattels,  
 effects, and premises, by public auction or private con-  
 tract, and, out of the produce thereof, after paying the  
 expenses of the sale and other charges, to pay or retain  
 said sum of 1600*l.* so due and owing as aforesaid,  
 so much or such part thereof as shall be then due  
 owing to *Nesham*, his executors, &c., on the security  
 hereby made, with all interest that may be then due  
 thereon; and, after satisfaction thereof, shall pay the  
 balance of such moneys unto *Hoggins*, *Curtice*, and *Hen-*  
*son*, their executors, &c.: provided always, and it is  
 hereby declared and agreed, that, notwithstanding any-  
 thing hereinbefore contained to the contrary, it is the  
 intent and meaning of these presents, and of the  
 conditions hereto, that the said recited promissory note  
 shall, when the same shall become due, and on payment  
 of the first instalment, be renewed, by *Hoggins*, *Curtice*,  
 and *Henderson* giving to *Nesham* a similar note, payable  
 twelve months after date, for the balance which shall be  
 then due to *Nesham*, and shall continue to be from time  
 to time so reduced and renewed, until the whole of the

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said sum of 1600*l.* and interest shall be fully paid and discharged in manner hereinbefore mentioned."

(Signed) " *James Hoggins.*

" *Robert Curtice.*

" *William Patton Henderson.*"

On the 15th of *June*, 1844, the defendant *Nesham*, with the consent of *Hoggins*, *Curtice*, and *Henderson*, entered into the following agreement respecting the said newspaper, stock, and other things, with the defendant *Lowthin*.

"Memorandum of agreement, made and entered into the 15th of *June*, 1844, between *William Nesham* of the one part, and *John Lowthin*, of &c., printer, of the other part: The said *W. Nesham* agrees to sell, and the said *John Lowthin* agrees to purchase, at and for the sum of 1500*l.*, payable by instalments as hereinafter mentioned, all the stock of type, presses, and printing materials in the office and premises of a newspaper called '*The Newcastle Advertiser and Commercial Herald*,' carried on and published at No. 89. *Side*, in *Newcastle-upon-Tyne* aforesaid, together with all stamps, paper, books, books of account, and all sums of money now due and owing and belonging to the proprietors of the said newspaper in respect of the said publication, and all the office furniture and other effects now within or upon the said premises: And it is agreed that the payment of the said purchase-money of 1500*l.* by the said *John Lowthin* shall extend over a period of seven years, and be made as follows, viz. that, during the first year from the date hereof, he shall pay interest only, at the rate of 5*l. per centum per annum* on the said purchase-money; that, during the second year, he shall pay the sum of 100*l.* on account of the said purchase-money and interest thereon; the further sum of 150*l.* during the third year; 250*l.* during the fourth year; 300*l.* during the fifth year; 300*l.* during the sixth year; and 400*l.* during the seventh



year of the said term : And it is further agreed between the said parties, and the said *W. Nesham* hereby undertakes to guarantee to the said *John Lowthin*, during the said period of seven years, the clear yearly profit of 150*l.* over and above the annual payments of principal and interest hereinbefore specified : in consideration of which guarantee, the said *John Lowthin* hereby consents and agrees to pay all surplus profits over and above the sum of 150*l. per annum* unto the said *W. Nesham*, until the same surplus profits amount to the sum of 500*l.*, if they shall amount to that sum during the period of seven years before mentioned ; and, further, that, if such surplus profits shall amount, during the period aforesaid, to 500*l.*, then he the said *John Lowthin* shall pay, over and above the said purchase-money of 1500*l.*, and 500*l.* profits, the present liabilities of the said newspaper office, estimated for the purposes of this agreement at, and guaranteed by the said *W. Nesham* not to exceed, 250*l.*, making together the sum of 2250*l.* ; but that, if such surplus profits shall not, during the said period of seven years, amount to 500*l.*, then the said liabilities shall be paid and discharged by the said *W. Nesham* : It is also agreed that the said *W. Nesham* shall continue to receive such surplus profits only until the same shall amount to 500*l.*, and that all additional surplus profits shall be the property of the said *John Lowthin*, and shall be taken by him for his own use and benefit : And it is further agreed, that, if at any time during the said period of seven years, the said *John Lowthin* shall be desirous of paying off the said purchase-money of 1500*l.*, and to take upon himself the payment of the present liabilities of the said newspaper office, he shall be at liberty to do so, upon releasing the said *W. Nesham* from the guarantee hereinbefore mentioned, and shall, in that case, from the time of paying the said purchase-money, take and re-

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ceive the whole amount of the profits of the said business to and for his own use and benefit: And it is also agreed that the said *John Lowthin* shall execute a mortgage of the said stock and premises to the said *Nesham*, for better securing the payment of the purchase-money hereinbefore mentioned: Provided always, and it is hereby lastly agreed, that, if the said *W. Nesham* shall, at the expiration of the second or any subsequent year of the term hereinbefore mentioned, be desirous of withdrawing the guarantee herein given, he shall, upon giving to the said *John Lowthin* six months' previous notice to that effect, be released from the said guarantee, and this agreement shall be considered in all respects an agreement for the sale and purchase of the said stock and premises for the sum of 1500*l.* absolutely.

(Signed) “*W. Nesham.*

“*J. Lowthin.*”

At the time the goods were so ordered and delivered as aforesaid, the business of the said newspaper office was carried on, and the said newspaper printed and published at the said office, by the defendant *Lowthin*, under the terms of the above agreement. No credit was given by the plaintiffs to the defendant *Nesham* in respect of the said goods, unless under the said agreement the defendant *Nesham* was interested and liable to the plaintiffs as a partner in the said newspaper business.

The plaintiffs contend, that, under the above agreement, the defendant *Nesham* was interested as a partner in the said newspaper business, and was liable to be sued with the defendant *Lowthin* for the goods so supplied by the plaintiffs for the purposes of such business.

If the court shall be of opinion that the plaintiffs are entitled to maintain this action, the verdict entered for



is to stand; otherwise, to be entered for the defendant *Nesham*.

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*Channell*, Serjt. (with whom was *M. Smith*), for the plaintiffs. Regard being had to the original situation of *Nesham*, as proprietor of the newspaper, and to the peculiar provisions of the agreement of the 15th of June, 1844, he is substantially the sole beneficial owner hereof; or, at all events, *quoad* third persons, he is subject to all the responsibilities of a partner. The sale was merely colourable. Whether or not a person is liable as a partner, depends upon whether or not he is entitled to a participation of profits. Even an express stipulation that one shall not be liable to losses, will not vary the rights of third persons having dealings with the concern. The real question is, whether *Nesham* takes, either in the shape of profits or of purchase-money, a portion of that fund to which creditors have a right to look for the payment of their debts. One of the leading authorities upon this subject, is, the case of *Wagh v. Carver*. (a) There, *A.* and *B.*, ship-agents at different ports, entered into an agreement to share, in certain proportions, the profits of their respective commissions and the discount on the bills of tradesmen employed by them in repairing the ships consigned to them, &c.: and it was held, that, by this agreement, they became liable to all persons with whom either contracted as such agent, though the agreement provided that neither should be answerable for the acts or losses of the other, but each only for his own. *Eyre*, C. J., referring to *Grace v. Smith* (b), says: "He who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes

(a) 2 *H. Blac.* 235.(b) 2 *W. Bl.* 998.



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from the creditors a part of that fund which is the proper security to them for the payment of their debts. The notes to that case in *Smith's Leading Cases* (a) correctly represent the law: "With respect to third persons, an *actual* partnership is considered by the law to subsist wherever there is a participation in the profits, even though the participant may have most expressly stipulated against the usual incidents to that relation. (c) Such stipulations will, indeed, hold good between himself and his companions, but will in no wise diminish his liability to third persons. And this is founded on a principle of justice to the community; for, to use the language of the lord chief justice in the principal case, 'by taking part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts.'" (d) [*Maule, J. Nesham* is at all events interested in the profits of this newspaper to the extent of the 500*l.*] Clearly he is. *Ex parte Wheeler* (e), *Ex parte Todd* (g), *Smith v. Wilson* (h), and *Cheap v. Cramond* (i) are to the same effect. And this court, in the recent case of *Patt v. Eyton* (k), distinctly recognised the principle—that one who takes a share of the profits, as such, of a trading concern, thereby becomes a partner as to third persons on the ground of those profits forming a portion of the fund upon which creditors have a right to rely for payment. *Tindal*, C. J., in delivering the judgment of the court, after a recapitulation of the facts, observes: "was contended that an actual partnership was prove

(a) Vol. I. p. 504.

(b) It makes the *quasi* partner liable to the same extent as an *actual* partner.

(c) See *Bond v. Pittard*, 3 M. & W. 357.

(d) Yet the liability of a *quasi* partner is *not* incurred by

an annuitant, who diminishes that fund by taking both *profit* and *principal*.

(e) *Buck*, B. C. 25.

(g) *Ib.* 48.

(h) 2 B. & C. 401.

(i) 4 B. & Ald. 663.

(k) *Ante*, p. 32.



for, *Eyton*, by taking 5 per cent. on the sales to his workmen, received a share of the profits, and was therefore, in point of law, a partner as to third persons. But we are of opinion that the taking of that money was not sufficient to make him a partner. Traders become partners between themselves by a mutual participation of *profit* and *loss* : but, as to third persons, they are partners, if they share the *profits* of a concern ; for, he who receives a share of the profits, receives a part of that fund upon which the creditors of the concern have a right to rely for payment, and is therefore to be made liable to losses, although he may have expressly stipulated for exemption from them." And, after referring to *Grace v. Smith* and *Waugh v. Carver*, in the former of which *De Grey, C. J.*, says : — " The true criterion is, to inquire whether *Smith* agreed to bear the profits of the trade with *Robinson*, or whether he only relied on those profits as a fund of payment — a distinction not more nice than usually occurs in questions of trade and *usury* " — his lordship continues : " This distinction has been recognised in many cases ; of which it may suffice to mention *Dry v. Boswell* (a) and *Benjamin v. Porters*. (b) And, although in *Ex parte Hamper* (c), Lord *Eldon* said the distinction was so thin (d) that he could not state it as established upon due consideration, yet he acted upon it in that case ; and again in *Ex parte Watson* (e), where he said — ' One who receives a salary, not charged upon profits, — according to a known, though nice distinction, — is not, by that, a partner.' Nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as agent, or commission on sales." [*Maule, J.*

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(a) 1 *Campb.* 329.(b) 2 *H. Bla.* 590.(c) 17 *Ves.* 404.

(d) The alleged principle,

of justice to the community,  
*suprà*, 650., appears to admit  
of no such distinction.

(e) 19 *Ves.* 459.



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is hereby agreed between the said parties to these presents, that, if the said *Hoggins, Curtice, and Henderson*, their executors, administrators, or assigns, or any of them, do and shall well and truly pay or cause to be paid unto *Nesham*, or his certain attorney, executors, administrators, or assigns, the sum of 1600*l.* sterling, with interest for the same after the rate of 5*l.* per cent. per annum, at the times and by the instalments hereinafter mentioned, that is to say, 380*l.* on the 21st of September, 1844, the further sum of 365*l.* on the 21st of September, 1845, the further sum of 350*l.* on the 21st of September, 1846, the further sum of 345*l.* on the 21st of September, 1847, the further sum of 320*l.* on the 21st of September, 1848, and the further sum of 105*l.*, being the balance of the said principal sum of 1600*l.* and interest, on the 21st of September, 1849, then and in such case, these presents, and every clause, article, condition, and thing herein contained, shall cease, determine, and be utterly void; otherwise to be and remain in full force, virtue, and effect: And the said *Hoggins, Curtice, and Henderson*, for themselves, their executors and administrators, do hereby covenant, promise, and agree, to and with *Nesham*, his executors, administrators, and assigns, by these presents, in manner following, that is to say, that they, *Hoggins, Curtice, and Henderson*, or some or one of them, or their or some or one of their executors and administrators, shall and will well and truly pay or cause to be paid unto *Nesham*, his executors, administrators, and assigns, the said sum of 1600*l.* and interest, at the times, and in manner, aforesaid, according to the true intent and meaning of these presents: and also, that, if the said *Hoggins, Curtice, and Henderson*, their executors or administrators, shall make default in payment of any of the instalments for or on account of the



loss:" and he refers to *Green v. Beesley* (a), where *Tindal*, C.J. observes: "I have always understood the definition of partnership to be a mutual participation in profit and loss." In *Bcete v. Bidgood* (b), upon the sale of an estate, it was agreed that the purchase-money should be paid by instalments, with *interest* at 6*l. per cent.*; and it was held, that the payments reserved under the name of *interest* were in substance part of the purchase-money; and that, unless the sale were merely colourable, the transaction was not usurious. Lord *Tenterden* said: "This case comes before the court out of a contract for the sale of an estate, not out of a contract of loan; though the parties have calculated the price partly in what they considered the value in present money, partly in money to be paid at a future day. They have chosen to call it 'interest,' which creates the whole difficulty. If they had said 'payable by instalments,' there would have been no doubt. Our business is, to look, not at the words, but at the substance." Here, the substance of the transaction, as well as the words, is, the sale of the newspaper for the sum of 1500*l.* In *Mair v. Glennie* (c), it was held, that an agreement between the owner and the captain of a ship, that the latter should have one-fifth share of the profit or loss of the voyage on ship and cargo, did not amount to a partnership. "It has been contended," said Lord *Ellenborough*, "that the captain was virtually a partner: but, on what ground has it been so contended? The ground is, because payment of the captain's wages was to depend, as to its amount, upon a reference to the value of the cargo: but, according to that mode of argument, every seaman in a *Greenland* voyage would become a partner in the fishing concern." [*Wilde*, C. J. You could only ascertain what *Nesham* would be en-

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(a) 2 N. C. 112., 2 Scott,  
164.

(b) 1 M. & R. 143.  
(c) 4 M. & S. 240.



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said sum of 1600*l.* and interest shall be fully paid and discharged in manner hereinbefore mentioned."

(Signed) " *James Hoggins.*

" *Robert Curtice.*

" *William Patton Henderson.*"

On the 15th of *June*, 1844, the defendant *Nesham*, with the consent of *Hoggins*, *Curtice*, and *Henderson*, entered into the following agreement respecting the said newspaper, stock, and other things, with the defendant *Lowthin*.

"Memorandum of agreement, made and entered into the 15th of *June*, 1844, between *William Nesham* of the one part, and *John Lowthin*, of &c., printer, of the other part: The said *W. Nesham* agrees to sell, and the said *John Lowthin* agrees to purchase, at and for the sum of 1500*l.*, payable by instalments as hereinafter mentioned, all the stock of type, presses, and printing materials in the office and premises of a newspaper called '*The Newcastle Advertiser and Commercial Herald*,' carried on and published at No. 89. *Side*, in *Newcastle-upon-Tyne* aforesaid, together with all stamps, paper, books, books of account, and all sums of money now due and owing and belonging to the proprietors of the said newspaper in respect of the said publication, and all the office furniture and other effects now within or upon the said premises: And it is agreed that the payment of the said purchase-money of 1500*l.* by the said *John Lowthin* shall extend over a period of seven years, and be made as follows, viz. that, during the first year from the date hereof, he shall pay interest only, at the rate of 5*l.* per centum per annum on the said purchase-money; that during the second year, he shall pay the sum of 100*l.* on account of the said purchase-money and interest thereon; the further sum of 150*l.* during the third year; 250*l.* during the fourth year; 300*l.* during the fifth year; 300*l.* during the sixth year; and 400*l.* during the seventh



purpose of shewing that the court must look at the general purview of the agreement, in order to ascertain the intention of the parties. It was there held that an agreement that the price of an estate should be paid at certain future days, with interest at *six per cent. per annum*, was not usurious — the court rejecting the technical term *interest*, and saying, that, though the parties chose to call a portion of the sum interest, it was in truth, only part of the purchase-money. Adopting the principle of that case, and looking at the intention of the parties to this agreement, I am unable to come to any other conclusion than that it created an interest in the profits of the concern in *Nesham*, which constituted him a partner, *quoad* third persons. The view presented by my brother *Maule*, in the course of the argument, seems to me to be the correct one. The result is this: — The concern is worth 1500*l.* *Nesham* and *Lowthin* enter into an agreement for a partnership, to endure for seven years: that limit being fixed, because it was presumed that within that time the 1500*l.* would be paid out to *Nesham*. If the profits were not sufficient to pay the 1500*l.* over and above the allowance of 150*l.* to *Lowthin*, *Nesham* was to get nothing; otherwise, he was to have the surplus profits, if and until they should amount to 500*l.* within the seven years. It is immaterial that the transaction might have been put upon a different basis by a six months' notice. All the cases seem to agree, that, whatever be the private stipulations between the parties themselves, an agreement for a participation in the profits constitutes a partnership as to third persons; for, it is but reasonable that one who stipulates for an interest in the profits should be held liable to those who supply the means of carrying on the trading concern out of which those profits are to arise. It is therefore material to ascertain what was the interest which *Nesham*

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created for himself by this agreement. He was to receive all the profits acquired by the publication of the newspaper, beyond 150*l. per annum* until the 1500*l.* and interest, and 500*l.* in addition, should have been fully paid. If no profits were realised beyond 150*l. per annum*, he would get nothing: for, it would be idle to say that he is entitled to receive the whole profits, and liable to pay 150*l. per annum* to *Lowthin*; the rule against circuity of actions would prevent that construction. Throughout each year of the term, *Nesham's* right to receive any thing depends upon the contingency of a fund accruing from profits. If during the term no profits are realised, no payments are to be made to *Nesham*. The argument has proceeded entirely upon the footing of the 1500*l.* being a sum that is to be absolutely paid. That clearly is not so. In a certain event only it is that the sums stipulated to be paid to *Nesham*, are to be paid, viz. in the event of profits being realized sufficient to pay them. It seems to me, therefore, upon the simplest principles applicable to the law of partnership, that *Nesham* has entered into the contract under circumstances that impose upon him a liability for goods supplied for the carrying on of the concern. It would be most unjust and unreasonable that he should be permitted to take the whole profits of the publication, and not be held responsible for the debts. For these reasons, I think the plaintiff is entitled to judgment.

COLTMAN, J. I am of the same opinion. The proviso that *Nesham* should have power to put an end to the partnership, has no bearing on the question. In considering what is the proper construction of the agreement, regard must be had to the terms on which the business was carrying on. The question is, not whether *Nesham* and *Lowthin* were, by this agreement, constituted partners as between themselves, but whether they were so with reference to third persons who



them is to stand; otherwise, to be entered for the defendant *Nesham*.

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*Channell*, Serjt. (with whom was *M. Smith*), for the plaintiffs. Regard being had to the original situation of *Nesham*, as proprietor of the newspaper, and to the peculiar provisions of the agreement of the 15th of *June*, 1844, he is substantially the sole beneficial owner thereof; or, at all events, *quoad* third persons, he is subject to all the responsibilities of a partner. The sale was merely colourable. Whether or not a person is liable as a partner, depends upon whether or not he is entitled to a participation of profits. Even an express stipulation that one shall not be liable to losses, will not vary the rights of third persons having dealings with the concern. The real question is, whether *Nesham* takes, either in the shape of profits or of purchase-money, a portion of that fund to which creditors have a right to look for the payment of their debts. One of the leading authorities upon this subject, is, the case of *Wagh v. Carver*. (a) There, *A.* and *B.*, ship-agents at different ports, entered into an agreement to share, in certain proportions, the profits of their respective commissions and the discount on the bills of tradesmen employed by them in repairing the ships consigned to them, &c.: and it was held, that, by this agreement, they became liable to all persons with whom either contracted as such agent, though the agreement provided that neither should be answerable for the acts or losses of the other, but each only for his own. *Eyre*, C. J., referring to *Grace v. Smith* (b), says: "He who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes

(a) 2 *H. Blac.* 235.(b) 2 *W. Bl.* 998.



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from the creditors a part of that fund which proper security to them for the payment of their debts. The notes to that case in *Smith's Leading Cases* correctly represent the law: "With respect to partnerships, an *actual* partnership is considered by the law to subsist wherever there is a participation in the profits, even though the participant may have most expressly stipulated against the usual incidents to that relation. Such stipulations will, indeed, hold good between the participant and his companions, but will in no wise affect his liability to third persons. And this is founded on a principle of justice to the community; for, to use the language of the lord chief justice in the principal case, 'by taking part of the profits, he takes from the creditors a part of that fund which is the proper security for them for the payment of their debts.'" (d) [In *Nesham* is at all events interested in the profit of the newspaper to the extent of the 500*l.*] Clear in *Ex parte Wheeler* (e), *Ex parte Todd* (g), *Smith v. Smith* (h), and *Cheap v. Cramond* (i) are to the same effect. And this court, in the recent case of *Eyton* (k), distinctly recognised the principle—who takes a share of the *profits*, as such, of a business, thereby becomes a partner as to third persons on the ground of those profits forming a portion of a fund upon which creditors have a right to rely for the payment of their debts. *Tindal*, C. J., in delivering the judgment of the court, after a recapitulation of the facts, observed that it was contended that an actual partnership was

(a) Vol. I. p. 504.

(b) It makes the *quasi* partner liable to the same extent as an *actual* partner.(c) See *Bond v. Pittard*, 3 M. & W. 357.(d) Yet the liability of a *quasi* partner is *not* incurred by

an annuitant, who takes a part of that fund by taking a share of the profits, and as principal.

(e) *Buck*, B. C. 2.(g) *Ib.* 48.

(h) 2 B. &amp; C. 401.

(i) 4 B. &amp; Ald. 66.

(k) *Ante*, p. 32.



for, *Eyton*, by taking 5 per cent. on the sales to his workmen, received a share of the profits, and was therefore, in point of law, a partner as to third persons. But we are of opinion that the taking of that money was not sufficient to make him a partner. Traders become partners between themselves by a mutual participation of *profit* and *loss* : but, as to third persons, they are partners, if they share the *profits* of a concern ; for, he who receives a share of the profits, receives a part of that fund upon which the creditors of the concern have a right to rely for payment, and is therefore to be made liable to losses, although he may have expressly stipulated for exemption from them." And, after referring to *Grace v. Smith* and *Waugh v. Carver*, in the former of which *De Grey, C. J.*, says : — " The true criterion is, to inquire whether *Smith* agreed to bear the profits of the trade with *Robinson*, or whether he only relied on those profits as a fund of payment — a distinction not more nice than usually occurs in questions of trade and usury " — his lordship continues : " This distinction has been recognised in many cases ; of which it may suffice to mention *Dry v. Boswell* (a) and *Benjamin v. Porteus*. (b) And, although in *Ex parte Hamper* (c), Lord *Eldon* said the distinction was so thin (d) that he could not state it as established upon due consideration, yet he acted upon it in that case ; and again in *Ex parte Watson* (e), where he said — ' One who receives a salary, not charged upon profits, — according to a known, though nice distinction, — is not, by that, a partner.' Nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as agent, or commission on sales." [*Maule, J.*

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(a) 1 *Campb.* 329.(b) 2 *H. Bla.* 590.(c) 17 *Ves.* 404.

(d) The alleged principle,

of justice to the community,  
*suprà*, 650., appears to admit  
of no such distinction.

(e) 19 *Ves.* 459.



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The nice distinction, to which Lord *Eldon* adverts, would arise in *Lowthin's* case, but not in that of the present defendant.] Upon all the authorities, it is quite clear that both were interested in the profits, and therefore both partners.

*Talfourd*, Serjt. (with whom was *Unthank*), contd. Upon the facts stated in the special case, it is not competent to the court to enter into any conjectural speculation as to whether or not the transaction between the several parties was colourable: the sole question is, what is the relation created between *Nesham* and *Lowthin* by the agreement of the 15th of June, 1844. [*Maule*, J. The proper way of taking the account between the parties under the agreement, as it strikes me, would be to treat *Nesham* as a person entitled to the whole profits of the newspaper, subject to the payments guaranteed to *Lowthin*.] *Nesham* does not stipulate for any part of the profits, as such. He could derive no larger benefit under the agreement than the annual payments and the gross sum of 500*l.* during the seven years. [*Maule*, J. The 1500*l.* is not to be paid at all, unless the profits of the concern realize it.] Assuming that to be the true construction of the agreement, it does not create a partnership. It might as well be said that a false representation on the sale of a public-house would create the relation of partners between the seller and the purchaser. The argument on the other side must, no doubt, prevail if the circumstances of this case would justify an affirmative answer to the question suggested as to the true criterion, by *Eyre*, C. J., in *Grace v. Smith* — whether *Nesham* agreed to share the profits of the trade with *Lowthin*. Mr. *Smith*, in his notes to *Waugh v. Carter* says: “ Actual partnership takes place when two or more persons agree to combine property, or labour, or both, in a common undertaking, sharing profit and



loss :” and he refers to *Green v. Beesley* (a), where *Tindal*, C.J. observes : “ I have always understood the definition of partnership to be a mutual participation in profit and loss.” In *Beete v. Bidgood* (b), upon the sale of an estate, it was agreed that the purchase-money should be paid by instalments, with interest at 6l. per cent. ; and it was held, that the payments reserved under the name of interest were in substance part of the purchase-money ; and that, unless the sale were merely colourable, the transaction was not usurious. Lord *Tenterden* said : “ This case comes before the court out of a contract for the sale of an estate, not out of a contract of loan ; though the parties have calculated the price partly in what they considered the value in present money, partly in money to be paid at a future day. They have chosen to call it ‘ interest,’ which creates the whole difficulty. If they had said ‘ payable by instalments,’ there would have been no doubt. Our business is, to look, not at the words, but at the substance.” Here, the substance of the transaction, as well as the words, is, the sale of the newspaper for the sum of 1500l. In *Mair v. Glennie* (c), it was held, that an agreement between the owner and the captain of a ship, that the latter should have one-fifth share of the profit or loss of the voyage on ship and cargo, did not amount to a partnership. “ It has been contended,” said Lord *Ellenborough*, “ that the captain was virtually a partner : but, on what ground has it been so contended ? The ground is, because payment of the captain’s wages was to depend, as to its amount, upon a reference to the value of the cargo : but, according to that mode of argument, every seaman in a *Greenland* voyage would become a partner in the fishing concern.” [*Wilde*, C. J. You could only ascertain what *Nesham* would be en-

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161. (a) 2 N. C. 112., 2 Scott,

(b) 1 M. & R. 143.

(c) 4 M. & S. 240.



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titled to, by taking the account.] That alone would not create a partnership.

*Channell*, Serjt., in reply. The only question in *Becte v. Bidgood* was, whether the contract was of a description that would render the parties liable to penalties for usury. [*Wilde*, C. J. The court held that there was no debt, no loan, no forbearance.] *Hesketh v. Blanchard*(a) is an authority to shew that any agreement for a share of profits will create a liability as partners, *quoad* third persons, though it be expressly stipulated that one shall not be responsible for losses.

WILDE, C. J. This is an action for goods sold and delivered: and the sole question is, whether, at the time the goods were supplied, the two defendants were partners in the concern for the use of which they were furnished. It appears that the goods consisted of stamps and paper for a newspaper called *The Newcastle Advertiser and Commercial Herald*, of which the defendant *Nesham* had formerly been the proprietor, but which he had sold to certain persons for the sum of 1600*l.* payable at distant periods, by instalments; that he had taken from those persons a mortgage of the newspaper, type, presses, and materials, for securing the purchase-money, with a power of sale; and that, pursuant to, and in the exercise of, such power of sale, and with the consent of the mortgagors, he, on the 15th of *June*, 1844, entered into an agreement for the sale of the newspaper and effects comprised in the indenture of mortgage, to *Lowthin*, the other defendant. We may exclude from our consideration all that occurred antecedently to the date of this agreement. The sole question is, what is its true effect. My brother *Talfourd* has relied upon the case of *Becte v. Bidgood*, for the

(a) 4 *East*, 147.



pose of shewing that the court must look at the general purview of the agreement, in order to ascertain the intention of the parties. It was there held that an agreement that the price of an estate should be paid at certain future days, with interest at *six per cent. per annum*, was not usurious — the court rejecting the technical term *interest*, and saying, that, though the parties chose to call a portion of the sum interest, it was truth, only part of the purchase-money. Adopting the principle of that case, and looking at the intention of the parties to this agreement, I am unable to come to any other conclusion than that it created an interest in the profits of the concern in *Nesham*, which constituted him a partner, *quoad* third persons. The view presented by my brother *Maule*, in the course of the argument, seems to me to be the correct one. The result is this: — The concern is worth 1500*l.* *Nesham* and *Lowthin* enter into an agreement for a partnership, to enure for seven years: that limit being fixed, because it was presumed that within that time the 1500*l.* would be paid out to *Nesham*. If the profits are not sufficient to pay the 1500*l.* over and above an allowance of 150*l.* to *Lowthin*, *Nesham* was to get nothing; otherwise, he was to have the surplus profits if and until they should amount to 500*l.* within seven years. It is immaterial that the transaction might have been put upon a different basis by a six months' notice. All the cases seem to agree, that, whatever be the private stipulations between the parties themselves, an agreement for a participation in the profits constitutes a partnership as to third persons; for, it is but reasonable that one who stipulates for an interest in the profits should be held liable to those who supply the means of carrying on the trading concern out of which those profits are to arise. It is therefore material to ascertain what was the interest which *Nesham*

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created for himself by this agreement. He was to receive all the profits acquired by the publication of the newspaper, beyond 150*l. per annum* until the 1500*l.* and interest, and 500*l.* in addition, should have been fully paid. If no profits were realised beyond 150*l. per annum*, he would get nothing: for, it would be idle to say that he is entitled to receive the whole profits, and liable to pay 150*l. per annum* to *Lowthin*; the rule against circuity of actions would prevent that construction. Throughout each year of the term, *Nesham*'s right to receive any thing depends upon the contingency of a fund accruing from profits. If during the term no profits are realised, no payments are to be made to *Nesham*. The argument has proceeded entirely upon the footing of the 1500*l.* being a sum that is to be absolutely paid. That clearly is not so. In a certain event only it is that the sums stipulated to be paid to *Nesham*, are to be paid, viz. in the event of profits being realized sufficient to pay them. It seems to me, therefore, upon the simplest principles applicable to the law of partnership, that *Nesham* has entered into the contract under circumstances that impose upon him a liability for goods supplied for the carrying on of the concern. It would be most unjust and unreasonable that he should be permitted to take the whole profits of the publication, and not be held responsible for the debts. For these reasons, I think the plaintiff is entitled to judgment.

COLTMAN, J. I am of the same opinion. The proviso that *Nesham* should have power to put an end to the partnership, has no bearing on the question. In considering what is the proper construction of the agreement, regard must be had to the terms on which the business was carrying on. The question is, not whether *Nesham* and *Lowthin* were, by this agreement, constituted partners as between themselves, but whether they were so with reference to third persons who



ished goods for carrying on the concern. A party stipulates for a participation in profits, as such, is as a partner *quoad* third persons, notwithstanding may have expressly stipulated that he shall not be subject to losses. With regard to the 500*l.*, the matter I think, still clearer than as to the other part of the . . . The quantum of profit to be received, is quite immaterial. Whether *Nesham* will ever obtain the 500*l.* depends upon the contingency—of profits arising out of publication sufficient to pay 150*l.* a year to *Lowthin*, the annual payments in liquidation of the 1500*l.* interest. I think it is quite clear, that, as regards claim of this plaintiff, *Nesham* was a partner.

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TAULE, J. I am of the same opinion. I quite agree we are to look at the substance, and not at the form, of the transaction. The question is, whether it gave *Nesham* an interest in the profits of the newspaper. Before the date of the agreement, the whole profits belonged to him. What does he, in substance, part with? *Lowthin* is to manage the concern, and to receive 150*l.* a year, at all events, for seven years. That is all that *Lowthin* is certain of receiving. Deduct that sum from the whole interest in the newspaper, and *Nesham* is interested in the excess, except in the improbable event of the profits realising more than sufficient to pay the annual instalments of the 1500*l.*, the 50*l.* a year to *Lowthin*, and the further sum of 500*l.* in the seven years. Upon that simple statement, it might very well be questioned whether *Lowthin* was a partner, or whether he was not a sort of salaried manager, remotely interested in surplus profits. It is, however, unnecessary to discuss that; for, no one disputes that he is a partner. (a) I think *Nesham* is a much

(a) He had suffered judgment by default; still non-lia- bility in *Lowthin* would have been a good defence to *Nesham*.



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more unquestionable partner than *Lowthin*. *Nesham*'s pecuniary stake is greater or less according to the amount of profits realised. It is quite impossible to say that he has not such an interest as to render him liable as a partner for goods supplied to the concern.

V. WILLIAMS, J., concurred.

Judgment for the plaintiff. (a)

(a) In the case of an *actual* partnership, the rule appears to be correctly laid down by *Pothier*, "Pour qu'une dette soit réputée dette de la société, et qu'elle oblige ainsi solidairement chacun des associés, il faut que deux choses concourent, 1<sup>re</sup> qu'elle ait été contractée par quelqu'un qui eût le pouvoir d'obliger tous les associés: 2<sup>e</sup> qu'elle ait été contractée au nom de la société." — *Contrat de Société*, No. 97.

### WHITE v. FELTHAM.

Nov. 25.

A declaration omitting to state whether the plaintiff sues in person or by attorney, is irregular; but the application to set it aside should be made at chambers.

An affidavit intitled, "*W. W.*, carrying on business under the name or style of *W. T. & Co.*, plaintiff, and *C. F.*, defendant" — the writ, — was held sufficient.

*BALL*, on a former day in this term, obtained a rule nisi to set aside the declaration filed in this case, for irregularity, with costs, as deviating from the form prescribed by *R. T. 3 W. 4. r. 15.*, which orders "that every declaration shall, in future, be intitled in the proper court, and of the day of the month and year on which it is filed or delivered, and shall commence as follows;" one of the forms given (for the commencement of a declaration after summons) running thus: "[*Venue*] *A. B.*, by *E. F.*, his attorney [*or*, in his own proper person] complains of *C. D.*, who has been summoned to answer the said *A. B.*," &c. In the present case, the declaration commenced thus: — "*London*, to wit. *William White*, carrying on business under the name or style of *William Turner & Co.*, complains of *Charles Feltham*, who has been summoned to answer the said *William White*," &c. — the plaintiff having so described himself in



not stating whether the plaintiff sued in person, or by attorney.

The affidavit upon which the motion was founded was intituled as follows: — “In the Common Pleas. Between *William White*, carrying on business under the name or style of *William Turner & Co.*, plaintiff, and *Charles Feltham*, defendant.” The plaintiff had been similarly described in the writ of summons.

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*Carrington* shewed cause, upon an affidavit which stated that the name of the plaintiff's attorney was indorsed upon the writ of summons, and also appeared at the foot of the notice of declaration served upon the defendant. He submitted that the affidavit upon which the motion was founded was incorrectly intituled. [*Wilde*, C.J. In intituling his affidavit, the defendant has followed the description the plaintiff has given of himself in the writ and declaration. Surely that is sufficient.] It was further submitted, that the writ and notice of declaration gave the defendant all requisite information for the delivery of his plea; that the rule of *Michaelmas term*, 3 *W. 4.*, was directory only, or, if compulsory, to be enforced by demurrer; that, if the court should think the departure from the prescribed form a mere irregularity — as was held in *Marshall v. Thomas* (a) — the defendant was not justified in incurring the expense of an application to the court, but should have gone to a judge at chambers: *Ward v. Graystock*. (b)

*Ball*, in support of his rule. The rule in question is clearly imperative: *Thompson v. Dicas* (c); *Dod. v. Grant* (d): and the case of *Marshall v. Thomas* is a

(a) 3 *M. & Scott*, 98., 2 *Dowl. P. C.* 208.

(b) 4 *Dowl. P. C.* 717.]

(c) 1 *C. & M.* 768., 2 *Dowl. P. C.* 93.

(d) 4 *Ad. & E.* 485, 6 *N. & M.* 70.



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distinct authority to shew that the proper mode of taking advantage of it is by motion, and not by demurrer. [*Wilde, C. J.* No doubt the declaration is irregular: but the question is, whether you do not lose your right to costs by coming to the court, instead of going before a judge at chambers.] The point is novel and of some importance, inasmuch as it involves a question upon the construction of a rule of court having all the force of an act of parliament; and, in term time, the parties could not have the assistance of counsel at chambers. In *Ward v. Graystock*, the application was to strike out counts, which is by the express language of the rule of Hilary term, 4 W. 4. r. 6., to be made to a judge at chambers, — unless it involves a point of law, or the construction of a statute: *Doe d. The Overseers of Llan-desillo v. Roe. (a)*

WILDE, C. J. The language of the rule and the form is perfectly clear and distinct; and, in some instances, it may be important that it should be strictly adhered to. The defendant ought to be duly informed as to who is the person to whom he is to deliver his plea. The declaration is therefore irregular, in omitting to shew whether the plaintiff sues in person or by attorney; and the rule must be made absolute for setting it aside: but, inasmuch as the defendant has unnecessarily come to the court, when the matter might have been set right, at much less expense, by a judge at chambers, the rule must be made absolute without costs.

The rest of the court concurring,

Rule absolute, without costs

(a) 4 Dowl. P. C. 222.



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## THORNE v. JACKSON.

Nov. 17.

DEBT, for goods sold and delivered, with a count upon an account stated. Plea, never indebted.

In his particulars of demand, the plaintiff claimed the sum of 4*l.* 11*s.* 6*d.*; and at the trial before the judge of the sheriff's court in *London*, he obtained a verdict for

“ Sworn in court the 5th day of *November*, 1846, before *E.V.W.*” (the judge's signature), is a sufficient jurat.

*Arnock*, on a former day, obtained a rule calling the plaintiff to shew cause why a suggestion should be entered on the roll, to entitle the defendant to the costs, under the *Middlesex* court of requests act. (a) affidavit upon which the motion was founded was

Upon a motion for a suggestion, under the *Middlesex* court of requests act (23 G. 2. c. 33. s. 19),

defendant, in his affidavit, described himself as “ of No. 51. *Bedford Row*, in the county of *Middlesex*; ” and alleged that he, “ before and at the commencement of the suit, was, and ever since had been, and still was, inhabiting a house situate in *Bedford Row* aforesaid, and that he, for and during all that time, and still was, liable to be summoned to the court of requests held at *Kingsgate Street*, *Holborn* aforesaid, and that the cause of action, and every part thereof, arose within the jurisdiction of the said court: ” —

It was held, that this affidavit did not allege, with sufficient distinctness, that the defendant resided in *Bedford Row*, in the county of *Middlesex*, or that the court of requests held at *Kingsgate Street*, was the *Middlesex* court of requests.

23 G. 2. c. 33., which (s. 19.), “ that, in case of debt or action upon which a writ of *scire facias* shall be commenced or prosecuted in any of His Majesty's courts of record at *Westminster*, and the defendant or defendants, at the time of the action brought, shall live or be in the said county of *Middlesex*, and be liable to be summoned to the said county court, and the jury upon the trial of such cause shall find the

damages for the plaintiff under the value of 40*s.*,—unless the judge shall in open court certify on the back of the record that the freehold or title to the plaintiff's land principally came in question, or that an act of bankruptcy principally came in question at such trial, — then and in such case no costs shall be awarded to the plaintiff in such action, but the defendant or defendants shall be entitled to, and recover, double costs of suit.”



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as follows : — “ *John Jackson*, of No. 51. *Bedford Row* ~~in~~  
*Holborn*, in the county of *Middlesex*, tailor, the above  
 named defendant, maketh oath and saith, that the above  
 named plaintiff did, on the trial of this cause, obtain a  
 verdict for the sum of 1*l.* 1*s.*, and no more: and ~~this~~  
 deponent further saith that this deponent, before and ~~at~~  
 the commencement of this suit, was, and ever since ~~has~~  
 been, and still is, inhabiting and resident in *Bedford*  
*Row* *aforsaid*, and that this deponent, for and during  
 all that time, was, and still is, liable to be summoned to  
 the court of requests held at *Kingsgate Street, Holborn,*  
*aforsaid*, and that the cause of the above action, and  
 every part thereof, arose within the jurisdiction of the  
 said court.”

*B. C. Robinson* shewed cause. The jurat of the affi-  
 davit upon which the present rule was obtained, is in-  
 sufficient. It runs thus : — “ Sworn in court, the 5th day  
 of *November*, 1846, before *E. V. Williams*” — not shewing  
*where* it was sworn, nor, otherwise than by mere recital,  
 that it was sworn before a judge. [*Maule*, J. The  
 proper form of jurat, as it seems to me, would be,  
 “ Sworn in court, this,” &c., without stating before  
 whom. In *Empey v. King* (a), a jurat stating the affi-  
 davit to have been sworn “ at my chambers, *Rolls*  
*Gardens, Chancery Lane*, this 19th day of *November*,  
 1844,” and signed by a judge, was held sufficient :  
 Lord Chief Baron *Pollock* observing, “ that, in the ~~case~~  
 of a commissioner, the omission of the words ‘ before me,’  
 may, perhaps, render the affidavit bad ; but it is not ~~so~~  
 here. This form of jurat has been invariably used, and  
 we are unwilling to disturb the practice by questioning  
 its validity.”] The affidavit does not sufficiently shew  
 that the defendant was, at the commencement of the

(a) 2 D. & L. 375.



is resident within the jurisdiction of the local court. There is no distinct averment that the whole of *Bedford Row* is in the county of *Middlesex*, or that the defendant is resident in a part that is within that county; or that the court held in *Kingsgate Street, Holborn*, to which the defendant is averred to be liable to be summoned, is the court of requests for the county of *Middlesex*; and that this court cannot take judicial notice that it is so.

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*Charnock*, in support of his rule. The affidavit shews a sufficient certainty that the place of the defendant's residence is in the county of *Middlesex*. The deponent swears by describing himself as of No. 51. *Bedford Row, Holborn*, in the county of *Middlesex*; and then goes on to state, that, before and at the commencement of the suit, he was, and ever since had been, and still was, resident "in *Bedford Row aforesaid*," which refers to and incorporates the previous allegation that *Bedford Row* is in the county of *Middlesex*. [*Maule J.* Does the statement amount to an allegation that the whole of *Bedford Row* is in the county of *Middlesex*? Besides, it is not very clear that the word "aforesaid" has reference to *Holborn*, rather than to *Middlesex*; and, if to the former, it is matter of notoriety that *Holborn* is not wholly situate within the county of *Middlesex*.] The court in question being held in *Kingsgate Street* under the authority of an act of parliament, the court will take judicial notice of its locality. If it was not held in that county, the plaintiff might have shewn that fact. (a) *Idde*, C. J. The defendant must make out a case to entitle him to enter a suggestion, as prayed; otherwise there is nothing for the plaintiff to answer.]

(a) See *Bishop v. Marsh*, *Thom v. Chinnoek*, 1 *M. & G. N. C.* 12., 8 *Scott*, 128.; 216., 1 *Scott*, *N. R.* 138.



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WILDE, C. J. It appears to me that the defendant in this case has failed to bring himself within the terms of the act of parliament. At all events, the affidavits upon which the motion is founded should shew, with a reasonable degree of certainty, that the applicant is a person entitled to the relief he seeks. Now, it is perfectly consistent with what is sworn here, that, though the defendant was resident in *Bedford Row* in the county of *Middlesex*, at the time the affidavit was made, he might have resided, at the time the action was commenced, in another part of *Bedford Row*, which may be in the city of *London*. He has, therefore, failed to shew with due certainty that he was resident in the county of *Middlesex* at the time of suit.

He has also, I think, failed to shew that he was resident within the jurisdiction of the court of requests for the county of *Middlesex* : for, we cannot take judicial notice that the court in *Kingsgate Street* is the court of requests for that county.

I therefore think the rule must be discharged.

COLTMAN, J. In *Rex v. Burridge (a)*, which was an indictment for aiding and assisting a felon to escape, the court said : “ It is not laid that this fact, of aiding and assisting, was done with force, nor that *Burridge* was present at the escape ; and therefore the aid and assistance might be afforded in a different county ; and we cannot take notice that the whole township or vill of *Ivelchester* is in the county of *Somerset*.” Neither can we take notice judicially that *Bedford Row* is in the county of *Middlesex*.

The other point I also think is equally fatal.

(a) 3 P. Wms. 439. 496.



**MATULE, J.** I am of the same opinion. We must not inference and implication supply facts which ought be distinctly and positively alleged in affidavits.

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**V. WILLIAMS, J.,** concurred.

Rule discharged. (a)

(a) The authority to enter a suggestion under this act, it is, still exists, notwithstanding the jurisdiction of the court is transferred to the new county courts established under the 9 & 10 Vict. c. 95. Per *Platt, B.*, in *Tims v. Smith, M. T.* 1847.

GILES and Another v. TOOTH.

SAME v. Ten other Persons, severally.

Nov. 14.

THE plaintiffs having brought eleven actions, against as many different individuals, charging them as members of the provisional committee of a projected way company,

The plaintiffs having brought eleven actions, against as many directors of a railway company, for the recovery of the same demand — the court refused to stay proceedings in all the actions but one.

*Fide post,*  
677, 699.

*Bramwell*, on a former day in this term, on behalf of several defendants, obtained a rule calling upon the plaintiffs to shew cause why the proceedings in each of the actions should not be stayed, until the court should otherwise order, except in such one of the actions as the plaintiffs should elect to proceed with. The motion was founded upon an affidavit which stated, that the actions were brought to recover 1560*l.* alleged to be due to the plaintiffs for certain services performed by them in connection with a proposed railway, to be called "*The Cambridge-and-Rye-Harbour Railway*;" that the several writs in the eleven actions bore date respectively the 8th June, 1846, the debt indorsed on each writ being



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1650l.; that declarations were delivered in all the actions on the 20th of *June*, the declarations and particulars of demand being the same in each action, except in the names of the defendants, and being in a lithographed form, in which the plaintiffs' names were printed,—whence the deponent inferred that a number of other actions had been brought by the plaintiffs against several other parties in respect of the same cause of action; *that the debt sought to be recovered in these actions was one debt only, and that, if it, or any part of it, was due from the defendants, it was due from them jointly, and not severally from each of them*, and that, if the plaintiffs should obtain judgment against any one of the defendants, they would have no legal right to proceed further against any other; *that it was impossible for any of the defendants to plead in abatement the non-joinder of co-contractors, owing to the great number of persons whose names appeared as being connected with the proposed railway*; and that no proceedings beyond the declaration, particulars of demand, and orders for time to plead, had taken place in any of the actions.

*Channell, Serjt., and Piggott*, shewed cause. This is not the ordinary application to consolidate the actions, but simply an application to stay the proceedings in several actions rightfully brought against several persons individually liable for the same debt, leaving the plaintiffs to proceed in one only. The rule prayed is one which the court has no power to make: and, even if it had such power, it would not be a fit case for its exercise. The defendants do not propose to be bound by the result of the case to be proceeded with: and, even if they did, the court has no power to compel the plaintiffs to become parties to such a bargain. It is not probable that the whole of the defendants became connected with the company at the same time; and therefore all



cannot be liable to precisely the same extent, each being responsible only for contracts entered into by the company since he joined it. In *Doyle v. Anderson* (a), it is held, that, where a plaintiff brings several actions on the same policy of assurance, against several underwriters, the court will not, without the consent of the plaintiff, make a consolidation rule, upon the terms both plaintiff and defendant being bound in all the actions by the event of one. This is not like the case *Sharpe v. Lethbridge* (b), where, five separate actions having been brought against five different individuals on five several guarantees given to secure distinct portions of the same debt, and a judge at chambers having made an order for consolidating them, this court refused to rescind the order; though, if it were necessary for the purpose of this argument, good reasons might be urged against the soundness of that decision. *Wilde, C. J.* I have known rules of this sort repeatedly granted in the case of actions upon bail-bonds.] In *Bartlett v. Bartlett* (c), the assignee of a replevin-bond having brought actions severally against the principal and his two sureties, the court made a rule that the proceedings in all the actions should be stayed, upon payment of the rent due, and costs; and that, upon such payment not being made, the first action should be proceeded with, the defendants in the other two actions agreeing to be bound by the event of the first. In *Pechell v. Layton* (d), the court refused (before trial) to stay proceedings in an action against a sheriff's officer for a penalty on the statute 32 G. 2. c. 28. s. 12., though a similar action had been commenced against the sheriff for the same offence. But, *after verdicts in both actions,*

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(a) 1 Ad. &amp; E. 635.

(b) 4 M. & G. 37., 4 Scott,  
N. R. 722.(c) 4 M. & G. 269., 4 Scott,  
N. R. 779.

(d) 2 T. R. 512.



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they stayed the proceedings in both, on payment of one penalty, and the costs of one action : *Pechell v. Martin*.<sup>(a)</sup> According to the case of *King v. Hoare* <sup>(b)</sup>, if this were a demand for which the defendants were jointly liable, a judgment, *without satisfaction*, recovered against one would be a bar to the actions against the others; or, possibly, the defendants might have a remedy by *audita querela*, to prevent the plaintiffs from obtaining satisfaction more than once : *Bac. Abr. Audita Querela* (P.)— The case of *Carne v. Legh* <sup>(c)</sup> will probably be relied on for the defendants. There, the plaintiff having brought two actions against two joint-contractors, for the same debt, the court set aside the proceedings, *without costs*, in one action, the debt and costs in the other having been paid. That would be an authority in point, if this had been the case of a joint contract; but it has no application to a case of several liability. *Abbott, C. J.* there says : “ This is not at all analogous to the case of several actions brought against the different parties to a bill of exchange; for, there, the parties are all severally liable; here, the partners in the company are only jointly liable, and, if sued separately, might plead in abatement.” [ *Wilde, C. J.* The defendants’ affidavit, which states that it was impossible for any of the defendants to plead in abatement the non-joinder of co-contractors, owing to their number, shews that the plaintiffs could not have sued them jointly.] Precisely so. *Anderson v. Towgood* <sup>(d)</sup>, which may also be relied on for the defendants, was the case of a joint and several bond upon which three actions had been brought; and there was no opportunity to plead in abatement.

(a) 2 T. R. 712.

(c) 6 B. & C. 124, 9 D. &

(b) 13 M. & W. 494. And  
 see *Henry v. Goldney*, 4 D. &  
 L. 6.

R. 126.

(d) 1 Q. B. 245.



*Bramwell*, in support of the rule. There are many cases in which the court has, in the exercise of its equitable jurisdiction, interposed summarily to relieve a defendant from the expense and inconvenience of circuitously availing himself of a defence to which he is by law entitled. Thus, in *Humphreys v. Knight* (a), a bankrupt, who had obtained his certificate after issue made and before judgment, but had omitted to plead it as *darrein continuance*, having been rendered in discharge of his bail after judgment, was discharged on motion: and in *Sudler v. Cleaver* (b), it was held, that, under the statute 6 G. 4. c. 16. s. 120., which authorizes the discharge of a certificated bankrupt taken in execution for a debt provable under his commission, the court has, incidentally, the power of staying, before judgment, proceedings against such bankrupt for such debt. In *Everett v. Youells* (c), where the jury had, by consent, been discharged from giving a verdict, and the plaintiff, instead of proceeding in that action — which he might have done, notwithstanding the discharge of the jury — brought a new action, for a cause admitted to be the same, the court stayed the proceedings, but refused to allow the defendant his costs of the latter suit. [*Wilde*, C. J. There the proceeding was against good faith.] So, in *Miles v. The Inhabitants of Bristol* (d), plaintiff having brought an action in the court of King's Bench against the hundred, pursuant to the Statute 8 G. 4. c. 31. (which requires such actions to be brought within three months), afterwards commenced another action in the Exchequer for the same cause — the court of King's Bench, on motion, compelled him to make his election in which suit he would proceed.

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(a) 6 Bingham 572., 4 M. & P. 375.

(c) 3 B. & Ad. 349., 1 N. & M. 530.

(b) 7 Bingham 769., 5 M. & P. 706.

(d) 3 B. & Ad. 545.



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[*Maule, J.* Do you contend that the court will interfere where the defendant may have relief on the record, or in some other way?] It clearly is no answer to say that the defendants might be relieved by the obscure, and almost obsolete, process of an *audita querela*. Wherever the legal relief is difficult of access, or vexatiously expensive, the courts appear to have interfered equitably. [*Maule, J.* You should add, “and where the defendant has an equitable case.”] In *Jefferies v. Sheppard (a)*, in an action against the sheriff to recover money levied under a *fi. fa.*, without any previous demand, the court of King’s Bench stayed the proceedings upon payment of the sum levied, *without costs*. In *Pechell v. Layton* and *Pechell v. Martin*, the court evidently proceeded upon the ground that one of the actions was improperly brought. Here, it is sworn, and not denied, that the defendants, if liable at all, are liable *jointly*; but they are deprived of the opportunity of pleading in abatement the non-joinder of co-contractors, by the difficulty in complying with the 3 & 4 W. 4. c. 42. s. 8. (b) There is no analogy between this case and the case of several actions upon a policy of assurance. Compelling a plaintiff to deliver particulars of his demand, is another instance of an equitable interference, on the part of the court, with the common law rights of a plaintiff. So, the staying proceedings until security is given for costs, in the case of a plaintiff residing abroad — which can only be justified on the

(a) 3 B. & A. 696.

(b) Which enacts “that no plea in abatement for the non-joinder of any person as a co-defendant, shall be allowed in any court of common law, unless it shall be stated in such plea that such person is resident within the jurisdiction of the court, and unless the place of

residence of such person shall be stated, with convenient certainty, in an affidavit verifying such plea.”

See *Taylor v. Harris*, 4 B. & A. 93.; *Newton v. Verbitz*, 1 Y. & J. 257.; *Lamb v. Smythe*, 15 M. & W. 433.; 3 D. & L. 712.; *Newton v. Stewart*, 4 D. & L. 89.



nd of the *inequity* of allowing a party to proceed  
 out placing himself, in respect of costs, on the same  
 ng as his opponent. At all events, some arrange-  
 : might be suggested, to relieve the defendants from  
 unnecessary accumulation of costs: for instance,  
 whole of the eleven defendants might be included in  
 action, the plaintiffs only taking a verdict against so  
 y of them as he may shew to be liable. [*Maule, J.*  
 defendants must, in that case, agree that each shall  
 able for as much as any one of them may be liable

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That would hardly be reasonable. [*Maule, J.*  
 r affidavit admits, that, if any débt is due to the  
 tiffs at all, it is due from all the defendants jointly.  
*Snell, Serjt.*, objected that trying eleven actions in  
 would be imposing a considerable practical difficulty  
 a the plaintiffs. *Maule, J.* And probably without  
 ing any substantial difference in the expense.]

VILDE, C. J. This rule calls upon the plaintiffs to  
 r cause why the proceedings in each of these eleven  
 ons should not be stayed until the court should  
 rwise order, except in such one of the said actions  
 he plaintiffs should elect to proceed with. The  
 and of the motion is, that the defendants will, by  
 wing the actions to go on, be placed in a situation of  
 aliar hardship, from which they can only be relieved  
 circuitous and expensive manner. The mere cir-  
 stance of the defendants being placed in a situation  
 ardship, is no ground for depriving the plaintiffs of  
 rights which ordinarily belong to suitors, unless the  
 rt can see that they have been guilty of improper or  
 ressive conduct, or that some equivalent can be given  
 he plaintiffs for the measure of relief afforded to the  
 ndants. Let us see, in the first place, how the de-  
 lants make out that they are entitled to the circuitous  
 ef suggested. It is said that they are unable to plead



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in abatément the non-joinder of co-contractors, owing to the great number of persons whose names appeared as being connected with the proposed railway ; the statute 3 & 4 *W. 4. c. 42. s. 8.*, requiring an affidavit verifying the statement in the plea, that such co-contractors are resident within the jurisdiction of the court, and also giving the places of residence of such co-contractors. But that very circumstance shews that the plaintiffs could not safely have sued any given number of the directors jointly. It is perfectly competent to the plaintiffs to proceed against any one of the parties separately, unless the defendant, so sued, can give them the benefit of a better writ against the whole of the joint-contractors. And, if any difficulty presents itself, it is one that is occasioned solely by the fact of the defendants' having entered into so inconvenient a partnership. The legislature having thought that pleas in abatément of this sort were attended with consequences that sometimes operated injustice to plaintiffs, and having incumbered it with some formalities and safeguards that were deemed necessary to counteract those unjust consequences, why are we to give to these defendants the same sort of relief that they would have had by a plea in abatément? I can discover no reason whatever for it. I think the defendants have failed to shew that they are entitled to relief by any circuitous mode. Have they, then, shewn anything amounting to misconduct on the part of the plaintiffs, to call for the equitable interference of the court to deprive the plaintiffs of their acknowledged legal right? The plaintiffs had no other mode of enforcing their remedy. There has been no abuse of the process of the court, no oppressive conduct on the part of the plaintiffs. What ground, then, is there to induce the court to interfere? I do not feel that we can pronounce any rule that would not operate injuriously upon the plaintiffs, or give rise to difficulties in the way of



their prosecuting the suit. If there be any great inconvenience or hardship in the present state of the law, resort must be had to the legislature to provide new remedies to meet new combinations of circumstances. However desirous we may be to help the defendants, I think we have no alternative, but must discharge this rule.

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COLTMAN, J. It appears to me also that the grounds upon which this application is rested, fail. The defendants insist that they are entitled to relief, though in a circuitous and inconvenient manner (a); and, further, that the bringing of several actions in respect of the same demand is oppressive and vexatious. In the cases cited, in which the court has interfered summarily to give the same measure of relief that the parties might have obtained indirectly, it clearly appeared that there were difficulties in the way of the defendants' obtaining their legal rights. None, however, are shewn here. And it cannot be said that the plaintiffs have acted vexatiously or oppressively in bringing separate actions, inasmuch as the case against each defendant will, in all probability, be very dissimilar. It would operate very hardly upon the plaintiffs, to compel them either to join all the defendants in one action, or to elect against which to proceed. I think they had reasonable grounds for acting as they have done.

The defendants have no right to complain of hardship; they will sustain no inconvenience, unless it shall turn out that they are resisting a legal demand. (b)

MAULE, J. I also am of opinion that this rule must be discharged. The plaintiffs are asserting a claim in

(a) *Vide post*, 684. n.

(b) Perhaps the court would not have discharged the rule simply on the ground that, if there was a legal defence, the

defendants would succeed in all the actions, and would not be legally damnified; as that answer might be given to every application to consolidate.



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respect of which they say eleven persons are individually liable to them. They might, however, find a difficulty in proving that all the eleven, and that the eleven only, are liable; and therefore, as they could not safely join them in one action, they are fully warranted in suing them separately. The defendants are unable, from the peculiar nature of the transaction they have been engaged in, to plead in abatement. The justice of the case is, that the plaintiffs should proceed against each and every of the defendants, and take from each his proportion of the damages they may recover. The defendants ask the court to interfere summarily, and stay the plaintiffs' proceedings unconditionally. The result of the abortive attempts to come to some arrangement, which have been made in the course of the argument, only shews how much better it is to leave the matter to be settled by known legal means. The cases that have been supposed to favour the application are very remote from the real point, which is, whether it is just and right that the court should interpose under circumstances such as the present. The plaintiffs had a legal right to do as they have done, and they could not have adopted any other course for the legal and proper enforcement of their demand. We could not grant the defendants what they ask, without depriving the plaintiffs of a right given to them by law.

V. WILLIAMS, J., concurred.

WILDE, C. J. The plaintiffs must have the costs of this motion. The defendants are not to be blamed for making it, but there can be no reason why they should not pay costs.

Rule discharged with costs. (a)

(a) See the next case.



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## NEWTON v. BLUNT.

Nov. 25.

THIS was an action brought by an allottee, against a provisional director, of a projected company, called "*The Direct-Birmingham-Oxford-Reading-and-Brighton-Railway Company*," to recover the sum of £ 15s., the amount of a deposit paid by the plaintiff for thirty shares in the company, with interest thereon, — the project having been abandoned.

The writ of summons was sued out on the 4th of July last, and a declaration delivered on the 20th. The defendant on the 1st of August pleaded non assumpsit; and on the 10th the issue was made up and delivered, and notice of trial given for the sittings in the present term.

On the 4th instant, an order was made by Cresswell, J., at the instance of the defendant, staying all other proceedings in the cause, "the debt having been paid by a joint-contractor."

The affidavit upon which this order was made, stated, that "the plaintiff had commenced as well this action as certain other action against one *Spottiswoode*, for the same identical cause of action; that the defendant did, on 31st of October last, pay to a clerk of Mr. *Elderton*, who is as well the attorney for the plaintiff in this action as in the said action against *Spottiswoode*, the sum of £ 13s. 9d., being the before-mentioned sum of 78£ 15s., with the interest thereon, and the costs of the action against *Spottiswoode*, pursuant to an order to stay proceedings in the said action, dated the 28th of October, 1846."

Two separate actions having been brought against two joint-contractors, in respect of the same demand, and the debt and costs in one action having been paid, a judge at chambers made an order staying the proceedings in the other action, without costs :— The court refused to rescind or vary the order.

*Newton*, in person, on a former day in this term, obtained a rule calling upon the defendant to shew cause



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why the order of *Cresswell*, J., should not be rescinded or why the same should not be varied in such manner as the court might direct.

*Peacock* shewed cause, upon an affidavit alleging that this action was brought against the defendant, as one of the provisional directors of a railway company, called "*The Direct-Birmingham-Oxford-Reading-and-Brighton-Railway Company*," for the recovery by the plaintiff from the defendant of the sum of 78*l.* 15*s.*, being the deposit upon thirty shares in the said railway company, allotted to the plaintiff, together with interest thereon; and that the plaintiff had also commenced another action against one *Andrew Spottiswoode*, as a provisional director of the said railway company, for the purpose of recovering the same identical sum and interest from *Spottiswoode*, and for the payment of which said sum and interest *Spottiswoode and the defendant in this action were, if at all, only jointly liable*. The order was perfectly warranted by the circumstances. The defendant was liable, if at all, only jointly with *Spottiswoode*, against whom another action has been brought, and who has paid the debt and the costs of that action. If a party has chosen to bring two actions, where by law he was only entitled to bring one, he cannot complain if he obtains costs in one only. *Carne v. Legh* (a) is precisely in point. There, the plaintiffs having brought two actions against two joint-contractors, for the same debt, the court set aside the proceedings, *without costs*, in one action, the debt and costs in the other having been paid; observing — "This being a joint debt, the plaintiffs were at liberty to sue all the debtors together, or any one separately, leaving him to plead in abatement; but they had no right to sue *all the parties*"

(a) 6 B. & C. 124., 9 D. & R. 126.



parately for the same demand." This is not like the case of an application to stay the proceedings in one of several actions, where the debt has *not* been paid (a): nor is it like the case of two concurrent actions against a drawer and the acceptor of a bill of exchange, where two claims are in respect of two different and distinct contracts. (b) But this is the case of a plurality of actions for the recovery of a joint debt, where both the contractors might have been sued in one action, and where one of them has paid the debt and costs. In *Chell v. Layton* (c) the court refused (before trial) to stay the proceedings in an action against a sheriff's officer for a penalty on the statute 32 G. 2. c. 28. s. 12., though a similar action had been commenced against a sheriff for the same offence: but, after the plaintiff obtained verdicts in both actions, the proceedings both were stayed, on payment of one penalty, and the costs of one action: *Peshall v. Martin*. (d) On that occasion, Lord Kenyon said: "The words of the act are to be taken *reddendo singula singulis*. So, by analogy, in the game laws, where several persons offend in going out and killing a hare, it has been determined that only one penalty can be recovered; though the plaintiff has his election to sue either." [*Maule, J.* That is not a case in which the plaintiff could have sued the sheriff and the officer jointly.] That makes it a still stronger authority for the defendant here. [*Wilde, C. J.* I think I have known instances of applications successfully made to stay the proceedings in three actions on a bail-bond, — against the principal and the two sureties, — on payment of the debt and costs in one.] That course was pursued, in the case of a replevin-

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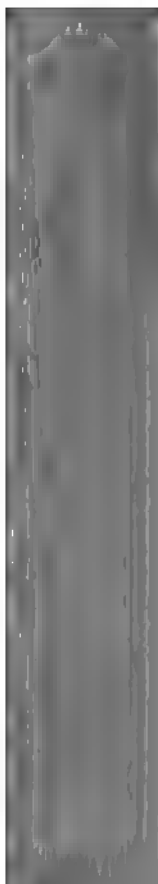
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(a) As in *Giles v. Tooth*, 12 B. & C. 124., 12, p. 665. *Carne v. Legh*, 6 B. & C. 124., 9 D. & R. 126.

(b) Per Abbott, C. J., in (c) 2 T. R. 512.  
(d) 2 T. R. 712.





*Goldney. (d)*] In *Miles v. The Inhabitants of*  
a plaintiff having brought an action in  
King's Bench against the hundred, pursuant  
7 & 8 G. 4. c. 31. (which requires such an  
action to be brought within three months), afterwards  
brought another action in the Exchequer for the same  
and the court of King's Bench, on motion  
him to make his election in which suit he would  
Lord *Tenterden* there says: "This court  
interfere absolutely to prevent the plaintiff"  
in an action which was properly brought  
have we any control over the action in the  
But we have authority to say, in the action  
in our court, that he shall not proceed further  
unless he abandon the one in the Exchequer  
therefore, make his election." There is  
hardship on the plaintiff, for, if he were to  
the defendant were to avail himself of the  
is now open to him, by a plea *puis darrein*  
not only would the plaintiff obtain no costs  
would have to pay the defendant costs from  
pleading such plea: *Lyttleton v. Cross. (e)*  
The debt having been paid, the plaintiff  
entitled to costs. *Maule, J.* It is quite evident  
proceedings ought to be stayed upon some  
only question is as to the costs already



Those costs have been improperly incurred. The defendant is clearly entitled to the equitable interference of the court, to prevent his being harassed and put to expense that can have no beneficial result even to the plaintiff.

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*Newton*, in support of his rule. The order in question is quite unprecedented, and operates gross injustice. The same thing was attempted, but without success, in *Giles v. Tooth*. (a) [*Wilde*, C. J. That was a totally different case: there, the defendants could not with safety have been sued jointly, inasmuch as the liability of each might have been different in degree. (b)] There have been numerous applications, in cases of this description, for rules in the nature of consolidation rules; but the courts have invariably refused to entertain them, unless the defendants would all consent to abide the result of an action against one. Even the recovery of a judgment against one of these parties would be no answer to the action against the other, without satisfaction. [*Wilde*, C. J. The case of *King v. Hoare* decides that it would.] That is, where the demand is a joint one; not where it is joint and several, as here. If this had been the case of a joint contract only, the defendant had a perfect remedy by plea in abatement. That this is a case of joint and several liability, is quite clear, since the case of *Walstab v. Spottiswoode* (c), *Reynell v. Lewis*, and *Wyld v. Hopkins* (d), which decide that no partnership is created amongst the provisional committee-men of railway projects. It has been suggested, that, in the event of judgment being obtained against one of several defendants sued under circumstances like the present, the plaintiff would, on a plea *puis darrein*

(a) *Antè*, p. 665.(c) 15 *M. & W.* 501.(b) *Vide post*, 684. (b)(d) *Ibid.* 517.



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*continuance*, be entitled to no costs. That, however, is not correct: he would, at all events, under the new rules (a), be entitled to the costs of the other issues. In *Carne v. Legh*, it distinctly appeared that the defendants, partners in a mining association, were liable jointly, and not severally. *Pechell v. Layton* and *Peshall v. Martin* are also distinguishable, on the ground that only one penalty was recoverable, and in reality to be ultimately paid by the officer. In *Miles v. The Inhabitants of Bristol*, the two actions were brought for the same cause, and substantially against the same party. It is true, it is sworn, on behalf of the defendant, that this was a case of joint liability (b); but that is a mere averment of a conclusion of law, and it is one which the plaintiff has no opportunity of answering.

It may be conceded that the court has power, by virtue of its equitable jurisdiction, to interfere to stay the plaintiff's proceedings; but the application for that purpose should have been made at an earlier stage; and at least the defendant should be compelled to relieve the plaintiff from the expense he has been wantonly put to.

WILDE, C. J. The question in this case lies in a very narrow compass: it is, whether the order of my brother *Cresswell* for staying the plaintiff's proceedings in this action, without costs, — on the ground that the debt and costs have been paid by another defendant, — was properly made. The application to the judge was grounded on the fact of the debt and costs having been paid by a joint-contractor. The summons distinctly points to that; and no doubt the order was made on that ground. If the plaintiff had intended to resist the application, on the ground that the case was one of *separate* liability, that ground should have been distinctly taken before

(a) *Reg. Gen. H. T. 2 W. 4.* (b) *Vide post*, 684. (b).  
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the judge. No such course, however, was adopted. From the materials before the court, we must intend that the judge treated the case as one of joint liability, and that his order proceeded upon that ground; especially as the plaintiff does not now shew that my brother *Cresswell's* decision had any other foundation. The materials upon which the summons was heard, and those now before us, all tend to the conclusion that this was a case of joint liability only: and, that being so, it is unnecessary to give any opinion as to whether or not there is any difference in this respect between a case joint and a case of separate liability.

Taking this, then, to be a case in which the plaintiff brought two actions, one against each defendant, in respect of a demand to which both were jointly liable, and one has satisfied the plaintiff's demand, together with the costs of the action against him, the question is whether the plaintiff has a right to proceed in the action against the other. It is said that the plaintiff had an undoubted right to bring two actions. In one case he certainly had. But what consequences does the bringing of two actions in respect of the same demand induce? Suppose the plaintiff had proceeded to judgment in one of them, the case of *King v. Hoare (a)* is a distinct authority to shew that the judgment might have been pleaded in bar of the second action. What would have been the plaintiff's situation, as regards costs, if the defendant in the second action had pleaded *puis darrein continuance* the judgment, with satisfaction, in the first action? It has been assumed that in such a case the plaintiff would be entitled, at all events, to the costs of the other issues. That, however, is not so. The effect of a plea pleaded *puis darrein continuance*, is, to remove all the other pleas from the record. A

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(a) 13 M. &amp; W. 494.



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plaintiff recovering no damages, is in no case entitled to costs. The demand in the present case having been satisfied, with costs, by one of the defendants, the plaintiff cannot recover damages, and consequently cannot be entitled to any costs, from the other defendant. All, therefore, that my brother *Cresswell's* order has done, is, that which the courts in numerous cases have done, viz. by a short and convenient course to attain a result that would have been attained without it, in a more circuitous, expensive, and inconvenient manner. It can be no advantage to a plaintiff to permit him to proceed in an action under such circumstances: seeing that he could recover neither damages nor costs, it is mercy to him, as well as justice to the defendant, to restrain him; and therefore, in interfering in this stage of the proceedings, the court is not withholding from the plaintiff any legal right. Is the court, in so doing, acting under the sanction of any authority? Undoubtedly it is. In the case cited, of two penal actions — the one against the sheriff, the other against the officer (*a*) — though the court declined to stay the proceedings before verdict, yet, after verdict, they did so, on payment of one penalty, and the costs of one action. Many cases have occurred within my experience, in which the proceedings have been stayed on the ground that their prosecution was vexatious, and must in the result prove fruitless. Here, the plaintiff having brought two separate actions against two persons who are jointly liable, one of the defendants has paid the whole debt and the costs in the action against him. The debt having been satisfied, if the plaintiff were allowed to proceed with his action against the other defendant, he clearly could not recover any damages, and consequently could not be en-

(*a*) *Pechell v. Layton*, 2 T. R. 512., and *Peshall v. Martin* *Ib.* 712.



itled to any costs. Suppose the plaintiff had proceeded to judgment in one action, the other defendant might, it seems, have pleaded such judgment in bar of the action against himself. Or, suppose money had been paid into court in the one action, and taken out in satisfaction of the entire demand in that action, might not the defendant in the other action have availed himself of that payment, by plea? (a) It being, therefore, quite clear that the plaintiff could in no event be entitled to any costs in the second action, my brother *Cresswell* thought, and, in my judgment, properly, that the defendant ought not to be harassed by proceedings from which the plaintiff could derive no possible advantage. It is now said that there may have been a several as well as a joint liability here, and, consequently, that the plaintiff was warranted in bringing two actions. It is enough, however, to say, that, when before the judge, the case presented on both sides was solely one of joint liability. It therefore seems to me that no injustice has been done to the plaintiff in staying proceedings that could only be productive of useless vexation and annoyance; and that this rule must be discharged, with costs.

MAULE, J. I am of the same opinion. The question is, whether the learned judge was, under the circumstances, warranted in ordering the proceedings in this action to be stayed without costs. For the reasons given by the lord chief justice, — which are perfectly satisfactory to my mind, — I think we must assume this to be a case of joint, and not of several liability; though, in my apprehension, that would make but little difference in principle, for, even in a case of several liability, where two or more actions have been brought to recover

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(a) *Vide Beaumont v. Greathead, antè, Vol. II. p. 494.*



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the same demand, and the debt and costs in one have been paid and received, I do not say that a judge would not be justified in staying the proceedings in the other actions upon payment of less than full costs; and, if he might, where is the limit? It is unnecessary, however, to discuss that question. It is perfectly clear, that, if this plaintiff — still assuming the case to be that of two *joint*-contractors — had gone on to judgment in both actions, he would only have been permitted to receive costs in one of them. The moment he received the debt and costs in one action, his demand would be extinguished; and, that being so, he clearly could not recover damages in another action in respect of the same demand. That, I apprehend, is quite clear. The statute of *Gloucester* (a) gives costs only where the party is entitled to recover damages. That which has taken place in this case would undoubtedly, if it had been pleaded *puis darrein continuance*, have disentitled the plaintiff to costs; and, if so, it ought to have the same effect now. The damages having been satisfied and extinguished, I am of opinion that whether the liability of the defendants was joint or several, the plaintiff could in no event be entitled to more costs than he has already received; and that the judge did no more than he was bound to do.

V. WILLIAMS, J., concurred.

Rule discharged, with costs. (b)

(a) 6 *Edw.* 1. c. 1. s. 2.  
 And see 2 *Inst.* 288.

(b) It does not appear to have been suggested to the learned judge at the hearing of the summons, or to have been urged in the argument of the

rule, that although *Blunt* and *Spottiswoode* were jointly liable, the acts to be given in evidence to fix them as directors might be different; as was pointed out in *Giles v. Tooth*, *antè*, p. 672.



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RIGHT v. BURROUGHES, BERKELEY, and LEADER. Nov. 11.

**TRESPASS.** The declaration stated that the defendants, on the 6th of *February*, 1844, and on divers other days &c., with force and arms, broke and entered certain dwelling-house of the plaintiff, situate in the parish of *St. Mary, Lambeth*, in the county of *Surrey*, and then made a great noise and disturbance therein, and lay and continued therein making such noise and disturbance for a long space of time, to wit, &c.; and then forced and broke open the door of the plaintiff of

The grantee of part of the grantor's reversionary interest in the whole of the property in which a particular estate — as a term of years — has been created, is an assignee

the reversion within the 32 H. 8. c. 34.; but the grantee of the whole reversionary interest in part of the property is not such an assignee.

*A.* in *February*, 1840, demised to *B.* for twenty-one years as from *Christmas* last; *B.* in *January*, 1841, demised to *D.* for three years, and, in *April*, 1842, demised to *E.* for the whole of *B.*'s term, less one day: —

Held, that *E.* was an assignee of the reversion of the premises demised, within statute.

A declaration in trespass alleged that the defendant *with force and arms* broke entered the plaintiff's dwelling-house.

Plea — that *A.*, being seised in fee of the dwelling-house, demised it to *B.* twenty-one years; that *B.* demised to the defendant for all the residue of term, wanting one day; and that the plaintiff, claiming title under colour of a charter of demise, pretended to have been thereof made to him by *A.*, for before the making of the demise by *A.* to *B.*, — whereas nothing ever passed virtue of that charter, — during the continuation of the several terms, entered the dwelling-house, and was thereof possessed; whereupon the defendant trespassed, &c.

Replication — that, before the making of the demise from *B.* to the defendant, whilst *B.* was possessed of the term, *B.* demised the premises to *D.* for three years; and that *D.* assigned his term to the plaintiff, who thereupon became possessed, and remained so until the committing of the trespasses.

Rejoinder — that the demise to *D.* was subject to a condition; that the condition was broken, and that the defendant entered for the breach: —

Held — first, that the defendant, being an assignee of the reversion within the H. 8. c. 34., could avail himself of the breach of condition — secondly, that the allegation of a mere pretended charter of demise did not shew title in the plaintiff — thirdly, that the allegation that the trespass had been committed *with force and arms*, did not import a forcible entry — fourthly, that the replication was not bad for departure.



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and belonging to the said dwelling-house, and damaged and spoiled the lock belonging to the said door, where-with the same was then fastened, of great value, to wit, of the value of 5*l.*; and also, during the time aforesaid, to wit, on the said 6th of *February*, 1844, with force and arms, seized and took divers goods and chattels of the plaintiff, to wit, &c. &c., of the value, &c., and divers other articles of the plaintiff then being in the said dwelling-house, being of great value, to wit, &c., and carried away and retained the same : that by means of the several premises the plaintiff and his family, during all the time aforesaid, not only were greatly disturbed and annoyed in the peaceable possession of the said dwelling-house of the plaintiff, but also the plaintiff was during all that time hindered from carrying on his lawful business therein, and during all that time lost and was deprived of the use and benefit of the said dwelling-house, and of the said goods and chattels; and by means thereof the plaintiff, for and during the time aforesaid, lost and was deprived of the profits, benefits, and advantages which might, and otherwise would, have arisen and accrued to him from the possession, use, occupation, and enjoyment of his said messuage; and other wrongs, &c.

The defendants *Burroughes* and *Berkeley* pleaded jointly, and the defendant *Leader* severally — first, not guilty — secondly, that the plaintiff was not, at either of the said times when &c., possessed of the dwelling-house in the declaration mentioned, in manner and form as was therein alleged; concluding to the country — thirdly, that the said goods and chattels were not, at the said time when &c., nor were nor was any of them, the goods and chattels of the plaintiff; concluding to the country.

Upon each of these pleas issue was joined.



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*Burroughes* and *Berkeley* further pleaded — fourthly, to all the trespasses except retaining the goods, that were any of the times when &c., to wit, on the 6th of January, 1840, one *William Morton*, being seised in fee of the dwelling-house in which &c., by indenture then made between the said *W. Morton* of the one part, and *Charles Leader* of the other part (profert), the said *Morton* demised unto *C. Leader* the dwelling-house in which &c., to hold the same unto the said *C. Leader*, his executors, &c., from thence for and during and until the expiration of a certain term not yet expired, to wit, until the full end and term of twenty-one years from the 25th December then last; as by the said indenture would appear; by virtue whereof *Leader* then entered into and became and was possessed of the demised premises for the said term; and that, being so possessed, *Leader* afterwards, and before any of the said times when &c., to wit, on the 23rd of April, 1842, did, by indenture then made between *Leader* of the one part, and the defendant *Burroughes* of the other part (profert), demise the premises to the defendant *Burroughes*, to hold the same unto &c., for and during all the residue of the said term so to him *Leader* granted as aforesaid, wanting one day as by the last-mentioned indenture would appear: the defendant *Burroughes* being so possessed, the plaintiff, claiming title to the said dwelling-house in which &c., under colour of a certain charter of demise pretended (a) to be thereof made to him by *Morton*, for the term of his natural life, before the making of the demise by *Morton* to *Leader* as aforesaid, whereas nothing had passed in the said dwelling-house in which &c., ever passed in virtue of that charter, afterwards, and before any of

(a) *Quære*, whether this charter does not vitiate the assertion of an actual colour and make the plea bad.



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the said times when &c., and during the continuance of the aforesaid several times, to wit, on the first of the said days in the declaration mentioned, entered into the said dwelling-house, and was thereof possessed : that thereupon *Burroughes*, in his own right, and *Berkeley* as his servant, and by his command, at the said several times when &c., entered into and upon the said dwelling-house in the declaration mentioned, and in which &c., in and upon the plaintiff's possession thereof, as being the dwelling-house of the defendant *Burroughes* : that, because the said goods and chattels in the declaration mentioned, before the said time when &c., had been wrongfully and injuriously put and placed, and were then wrongfully in the said dwelling-house, incumbering the same, and doing damage there to the defendant *Burroughes*, he, *Burroughes*, and *Berkeley* as his servant, and by his command, at the said time when &c., seized and took the said goods and chattels, so being in the said dwelling-house, and so incumbering the same as aforesaid, and removed and carried away the same to a small and convenient distance, to wit, in the parish aforesaid, and there left the same for the use of the plaintiff, doing no unnecessary damage to the same on the occasion aforesaid, as they lawfully might for the cause aforesaid; and that such were the same supposed trespasses in the introductory part of the plea mentioned, and whereof the plaintiff had above complained — verification.

To this fourth plea the plaintiff replied, that, before the said times when &c., and before the making of the said indenture between *Leader* and *Burroughes* as in the said fourth plea mentioned, and while *Leader* was possessed of the said term as in that plea mentioned, to wit, on the 19th of *January*, 1841, *Leader*, being possessed as aforesaid, demised the said dwelling-house in which &c., with the appurtenances, to one *H. Finnis*, from



thenceforth for a certain term, to wit, for the term of three years, then next following, and fully to be complete and ended; by virtue whereof *Finnis* entered into and upon the said dwelling-house in which &c., with the appurtenances, and was thereof possessed for the last-mentioned term; that *Finnis*,—being so possessed as aforesaid, and during the continuance of the said last-mentioned term, and before the said times when &c., to wit, on the 11th of *August*, 1843, by a certain assignment in writing, signed by *Finnis*,—bargained, sold, assigned, transferred and set over unto the plaintiff the last-mentioned term, and all the right, title, and interest of *Finnis* therein then to come and unexpired; that, by virtue of that assignment, the plaintiff afterwards, to wit, on the day and year last aforesaid, entered into the said dwelling-house, and became and was possessed thereof, and continued so thereof possessed from thence until the defendants *Burroughes* and *Berkeley* afterwards, and during the continuance of the said assignment, to wit, at the said time when &c., of their own wrong, broke and entered the said dwelling-house, and committed the said several trespasses in the introductory part of the said fourth plea mentioned, and to which the said fourth plea was pleaded, in manner and form as the plaintiff had above thereof complained—verification.

Rejoinder—that the demise in the said replication mentioned was made by *Leader*, and accepted by *Finnis*, upon certain terms and agreements, and subject to certain conditions, that is to say, upon the terms and conditions (amongst others) that *Finnis*, his heirs, executors, administrators, and assigns, should and would,—and *Finnis* did, upon the making and acceptance of the said demise, for himself, his executors, administrators, and assigns, promise and agree with and to *Leader*, his executors, administrators, and assigns, that he, *Finnis*, his executors, administrators, and assigns, should and would,

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— during the said term, keep the said premises in tenantable repair, and paint, in a proper and workmanlike manner, the wood and iron work of the said premises, where necessary to be done for the preservation thereof, and that, if he, *Finnis*, his executors, administrators, and assigns, should not properly keep and perform the said agreement, it should be lawful for *Leader*, his executors, administrators, or assigns, to re-enter into the demised premises, and to re-possess and enjoy the same as in his or their first and former estate; that *Leader* did not, nor would, nor did nor would the plaintiff, nor did nor would any other person, keep the said premises in tenantable repair during the said term, but, on the contrary thereof, *Leader*, after the making of the indenture in the said defendant's said fourth plea lastly mentioned, and before the making of the said assignment in the replication mentioned, and the plaintiff after the making of the said assignment, wrongfully suffered and permitted the same premises to be, and the same were at the time of the making of the said indenture, and from thence continually until and at the said times when &c., ruinous, prostrate, and in great decay, and in bad and untenable condition for want of needful and necessary reparations, contrary to the form and effect, true intent and meaning of the said agreement—wherefore the defendants entered, as in the said plea is alleged, for breach of the said condition, and in order that *Burroughes* might re-possess and enjoy the same premises—verification.

Special demurrer there to.

To this rejoinder the plaintiff demurred specially, assigning for causes—that the rejoinder neither traversed nor confessed and avoided the replication to which it was pleaded—that it afforded no answer to the replication, in this, that it set forth an agreement by and between *Leader*, his executors, administrators, and assigns, and *Finnis*, his executors, administrators, and assigns, and the defendants *Burroughes* and *Berkeley* then endeavoured to take advantage, in the rejoinder, of the said agree-



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ment; whereas it appeared, by the plea of the defendants *Burroughes* and *Berkeley* by them fourthly above pleaded, that *Burroughes* was not an assignee of *Leader*, but an under-lessee — that the agreement set forth in the rejoinder gave only to *Leader*, his executors, administrators, and assigns, an authority to re-enter — that, whereas the defendants *Burroughes* and *Berkeley*, in their fourth plea, alleged that they entered in right of the defendant *Burroughes*, and in the rejoinder alleged that they entered, in order that the defendant *Burroughes* might repossess and re-enjoy the premises in the rejoinder mentioned, that the said two defendants did not shew by the said rejoinder any authority whatever in them, or in either of them, to enter on the premises in the rejoinder mentioned, for breach of the said condition or otherwise — that no authority was shewn, in the said rejoinder, for any one to re-enter except by the enforcement of their legal remedy, if any, by ejectment (a) — that it was not shewn, in or by the rejoinder, that the premises were out of repair, inasmuch as it was therein alleged that *Leader* and the plaintiff suffered the premises to be out of repair, but not that *Finnis* suffered them to be out of repair, and, for any thing that appeared in the rejoinder, *Finnis* may have put and kept the premises in repair and tenantable condition — and that the plaintiff could not take any material issue on the said rejoinder, or on any part thereof. Joinder in demurrer.

*Pearson*, in support of the demurrer. The main question here is, whether the defendant *Burroughes* was an assignee within the meaning of the 32 H. 8. c. 34.; the first section of which enacts, “that, as well all and every person and persons, and bodies politic, their heirs, successors, and assigns, which have or shall have

(a) He who cannot enter, *John Doe* to enter. See 1 M. & R. 220 n.



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any gift or grant of our sovereign lord, by his letters-patent, of any lordships, manors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments, or of any reversion or reversions of the same, which did belong or appertain to any of the said monasteries and other religious or ecclesiastical houses, dissolved, suppressed, relinquished, forfeited, or by any other means come to the King's hands since the 4th of *February, 27 H. 8.*, or which at any time heretofore did belong or appertain to any other person or persons, and after came to the hands of our said sovereign lord, as also all other persons being *grantees or assignees* to or by our said sovereign lord the King, or to or by any other person or persons than the King's highness, and the heirs, executors, successors, and assigns of every of them, shall and may have and enjoy like advantages against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing of waste, or other forfeiture; and also shall and may have and enjoy all and every such like and the same advantage, benefit, and remedies by action only, for not performing of other conditions, covenants, and agreements contained and expressed in the indentures of their said leases, demises, or grants, against all and every the said lessees and farmers and grantees, their executors, administrators, and assigns, as the said lessors or grantors themselves, or their heirs or successors, ought, should, or might have had and enjoyed at any time or times, in like manner and form as if the reversion of such lands, tenements, or hereditaments, had not come to the hands of our said sovereign lord, or as our said sovereign lord, his heirs and successors, should or might have had and enjoyed in certain cases, by virtue of the act made at the first session of this present parliament, if no such grant by letters-patent had been made by his highness." *Whitton v.*



*Peacock* (a) is a distinct authority to shew that *Burroughes* was not such an assignee of the reversion as that statute contemplated. The marginal note in that case is as follows:— In 1762, a lessor having only an equitable estate in a certain field, demised a portion of the field to a lessee for ninety-nine years. In 1773, the lessor, having acquired the legal estate in the field, demised the residue of the field to the lessee, for the same term, by an indenture which recited the former lease, and stipulated for its continuance in force, but provided that no more rent should be paid for the entire field than was paid for the first portion, and that the rent to be paid for the entire field was meant to be the same as that reserved for the first portion. Held, that the assignee of the reversion could not sue the assignee of the lessee, upon the covenants contained in the lease of 1762. (b) Here, as in that case, there is no privity of contract that can be assigned over in this way. It was upon this principle that it was held, in *Holford v. Hatch* (c), that a landlord cannot maintain an action of covenant for rent, against an undertenant. Lord *Mansfield* there said: “For some time, we had great doubts; we have bestowed a great deal of consideration on the subject, and looked fully into the books; and it is clearly settled (and is agreeable to the text of *Littleton*), that the action cannot be maintained, unless against an assignee of *the whole term*.”

So, in *Brewer v. Hill* (d), lessee of tithes agreed with the owner of lands, for certain collateral considerations, not to take tithes in kind from the tenants of the land for twelve years, but to accept a reasonable composition, not exceeding 3s. 6d. per acre, and thereto bound himself and his assigns; and it was held that an under-lessee was not an assignee within the meaning of the

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(a) 2 N. C. 411., 2 Scott,  
80. But see 5 N. & M.  
75. n.

(b) But see 11 M. & W. 343.

(c) 1 Dougl. 183.

(d) 2 Anstr. 413.



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covenant. To the like effect is *Chaworth v. Phillips* (a): — “Fuit resolve, que si un lease soit fait sur condition destre void si 10*l.* ne soit pay al un certaine jour, le grantee del revercōn n’entrera pur tiel condition, quia est collateral. Resolve auxi, que si un lessee pur 20 ans fait lease pur 10 ans sur ascū condicōn, et puis le lessee pur 20 ans surrender al cestuy en revercōn, que cestuy en reversion ne prendra benefit del condition, quia il est eins d’un auter estate paramount.” In *Ca. Litt.* 215. a., it is laid down, “that a grantee of part of the reversion shall not take advantage of the condition; as, if lease be of three acres, reserving rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for that it is entire, and against common right.” [*Maule, J.*, referred to *Iskerwood v. Oldknow*. (b) There, a devise was, to the use of *H. J.* for life, without impeachment of waste, &c.; remainder to the use of the plaintiff for life, with power to make leases for two or three lives, &c., or for the term of twenty-one years, so as there were reserved the best rent, without taking any sum or sums of money or other thing for, or in lieu of, a fine. *H. J.*, by indenture of the 15th of October, leased for fourteen years, to be computed, as to the meadow land, from the 19th of February then last, the pasture land from the 25th of March last, and the messuage from the 25th of May last, under a yearly rent, payable to the lessor and such other person as should be entitled to the freehold and inheritance, half-yearly, on the 11th of November and 25th of March, the first payment to be made on the 11th of November next ensuing; and the lessee covenanted with the lessor, his heirs and assigns, for payment to the lessor and such other person, &c., of the rent at the days

(a) Sir *F. Moore*, 876.(b) 3 *M. & S.* 382.



and times, &c. : and it was held that the plaintiff, after the death of *H. J.*, was an assignee within the statute 32 *H. 8. c. 34.*, and might maintain covenant against the lessor for rent arrear after the death of *H. J.*, and during the continuance of the term.] In that case, the remainder-man had the same quantity of estate that the tenant for life had. [*Maule, J.* The case has always been considered as having much extended the rights of assigns of reversions. (a)]

The defendants plead in the usual form, giving colour by a charter of demise for life, without any allegation of livery of seisin: *Leyfield's* case. (b) In *Doctrina Placitandi* 73, it is said, "that, in an assise, it is no plea to say that *J.* enfeoffed him, and that the plaintiff, claiming by colour of a feoffment, whereby nothing passed, &c., entered; for, the law intends that that is not a feoffment without livery." Consequently, the charter of demise alleged by the defendants, shews a good title in the plaintiff; for, since the 8 & 9 *Vict. c. 106. ss. 2, 3.*, estates may be conveyed without livery of seisin. [*Maule, J.* The plea does not state that a charter of demise *was* executed, but that the plaintiff entered, "claiming title to the dwelling-house in which &c. under colour of a certain charter of demise pretended to have been thereof made by *Morton.*" There is, therefore, no allegation that any thing passed by that instrument. (c)]

(a) In that case, it was held that an action of covenant lay for the assignee of the *land*; whereas the statute gives it only to the assignee of the *covenantee*. The court, assuming it to be sufficient if the plaintiff could be shewn to be assignee of the *land*, held, that the term being created under a *power*, took effect as a *particular* estate created, not by the donee, but

by the donor of the power, and that the case therefore stood as if the donor having granted a lease, had afterwards devised to *Isherwood*, for life; under which devise *Isherwood* would have taken, not a life-estate in *remainder*, but a life-estate carved out of the *reversion*.

(b) 10 *Co. Rep.* 88.

(c) *Vide supra*, 688.

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The declaration charges an entry *vi et armis*. *Newton v. Harland* (a), and the authorities cited in that case, shew that a landlord is not justified in a forcible expulsion of a tenant who holds over after the expiration of his term. [*Coltman*, J. The averment that the alleged trespass was committed *vi et armis*, it seems, is mere form, importing nothing more than that the act was done with a sufficient degree of force to enable the defendants to obtain possession : *Harvey v. Brydges*. (b) *Wilde*, C.J. The landlord may enter, provided he does it peaceably; *Taunton v. Costar* (c).] That is expressly negatived here.

The fourth plea sets up a title under a lease alleged to have been granted by *Morton* to *Leader*, and in the rejoinder, the defendants *Burroughes* and *Berkeley* seek to excuse the trespass by reason of a condition broken. The rejoinder, therefore, is bad on the ground of departure. The test of an objection of this sort is thus given by *Tindal*, C. J., in *Smith v. Nicolls* (d): "That which is a departure in pleading, is a variance in evidence; and, if the evidence in support of the replication would sustain the allegation in the declaration, there is no departure."

*Dowling*, Serjt., *contra*. *Burroughes* is an assignee of the reversion within the 32 H. 8. c. 34. In *Co. Litt.* 215. a., it is said, "that, where the statute speaks of grantees and assigns of the reversion, an assignee of part of the state of the reversion may take advantage of the condition: as, if lessee for life be, &c., and the reversion is granted for life, &c.: so, if lessee for years &c. be, and the reversion is granted for years, the grantee for years shall take benefit of the condition in respect of

(a) 1 M. & G. 644., 1 Scott,  
 N. R. 474.

(b) 14 M. & W. 437., 3 D. 147.  
 & L. 55.

(c) 7 T. R. 431.

(d) 5 N. C. 208, 7 Scott,



his word [executors] in the act." In *Palmer v. Thorpe* (a),  
 L. lets the manor of *D.* to *E.* for thirty years, and the  
 next day lets it to another for forty years, to commence

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*Michaelmas* next after the date: the tenant doth at-  
 tain; the question was, if it be a good grant of the re-  
 version, being to commence at a day to come. *Gawdy*:

A reversion for years cannot commence at a day to  
 come; for, then the grantor shall have a lesser estate  
 himself." *Wray*: "The reversion being for years,

a chattel which may well expect; and, if I have a  
 manor in fee, I may grant it for years to commence at  
*Michaelmas*; for, an estate doth not pass, but an in-  
 terest." *Coke*: "It hath been adjudged, if a man grant

a term from *Michaelmas*, it is good, for, it is as a lease  
 from *Michaelmas*." So, in *Bacon's Abridgment* (b), it

said, that, "If one, having made a lease for life or  
 years to *A.* of lands, after make another lease for years  
 to *B.* of the same lands, or of the reversion of those  
 lands, *habendum* the said lands, or the reversion of those  
 lands, to the said *B.*, *cum post sive per mortem, resigna-  
 tionem, sursumrestitutionem, vel aliquo alio modo, vacare  
 contigerit*; in this case *B.* hath election to take such  
 lease either as a reversion or as a reversionary interest,

he can prevail for an attornment of *A.*, the tenant in  
 possession; or, if not, yet, as a future *interesse termini*,  
 such lease will be good to take effect in possession, upon  
 the determination of the first lease, be it by death, sur-  
 render, forfeiture, effluxion of time, or any other way."

Attornment not being now necessary, the effect of these  
 authorities, as also of *Smith v. Stapleton* (c), and *Fitch v.  
 Vaughan* (d), is, to show that *Burroughes* is an assignee  
 of the reversion within the statute. He clearly was so  
 during the subsistence of the underlease to *Finnis*.

(a) *Cro. Eliz.* 152.(c) *Plowd.* 426. 433.(b) *Tit. Leases and Terms*(d) *Noy*, 153.

7 years (N).



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[*Maule, J.* You insist that an assignee of *part* of reversion, is an assignee of the reversion within meaning of the statute.] That is the contention. Turning of this statute, it is said in *Selwyn's Nisi Prius* "In respect of this word [executors], it hath been holden that an assignee of part of the reversion, — as, an assignee of the reversion for years of all the state demised, — enter for condition broken. (b) So, the grantee for years of a reversion, is an assignee within this statute, and enter for condition broken. (c) But the grantee of the whole estate in reversion *in part of the thing demised* is not within the meaning of the statute; as, if the reversioner in fee of four acres grants two acres in fee, the grantee cannot enter, because *conditions* cannot be apportioned by act of the party. (d) But *covenants* made by the reversioner will lie by the assignee of the reversion of part of the demised premises, against the lessee, for not repairing such part."

*Pearson*, in reply. None of the authorities cited by the defendant meet this case. The lessor retains a reversion, the grantee, therefore, has not the same estate that he had pending the underlease, — as in *Whitton v. Pearce*.

WILDE, C. J. The principal question in this case is whether the defendant *Burroughes* was assignee of the reversion expectant on the determination of the lease granted by *Leader* to *Finnis*, and by *Finnis* assigned to the plaintiff. Upon the authorities, I think it is quite clear that he was such assignee within the statute 32 H. 8. c. 34. It appears that *Morton*, the owner

(a) 9th edit. p. 485. n. (27).

(b) Citing *Matures v. Westwood*, Cro. Eliz. 599, 600. 617., Sir F. Moore, 527.; 1 Inst. (Co. Litt., 215. a.

(c) Citing *Kidwelly v. Brudenell*, Plowd. 71.

(d) Citing 4 Leon. 27.

(e) 2 B. &amp; Ald. 105.



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the fee, by indentures of the 6th of *February*, 1840, demised the premises to *Leader* for twenty-one years from the 25th of *December* then last; that *Leader*, on the 19th of *January*, 1841, demised them to *Finnis* for three years; and that *Leader*, on the 23rd of *April*, 1842, demised to *Burroughes* for the whole of his, *Leader's*, term, except one day. That the demise of the reversion expectant on the determination of the lease under which the plaintiff claimed, was an assignment of the reversion within the statute, none of the authorities cited induce me to doubt. Most of them are applicable to assignments of the reversion of *part of the property*. It is clear that an assignee of part of the reversion, in that sense, cannot take advantage of a condition broken. But here, the whole reversion came to the defendant. It seems to me, therefore, that the demurrer assigning for cause that the plea does not shew the defendant possessed of the reversion, fails. This also disposes of the objection as to absence of privity of contract.

It is said that the defendant *Burroughes* had no right to enter; and that the allegation in the declaration, that that which is complained of was done with force and arms, distinguishes this case from *Newton v. Harland*, and that class of cases. The words with force and arms, however, clearly have not, as is shewn by the case of *Harvey v. Bridges*, the effect imputed to them. Formerly a doubt was entertained whether a landlord was justified in entering and expelling the tenant on the expiration of his term. But that doubt has been set at rest ever since the case of *Taunton v. Costar*, subject, of course, to any question of excess. Upon the whole, therefore, it seems to me, that, when the defendant says he was assignee of the reversion, and entered in respect of that reversion for condition broken, he gives a substantial answer to the action.

The objection that the rejoinder is a departure from





The doctrine laid down in *Co. Litt.* 21 where the statute speaks of grantees and as reversion, an assignee of part of the estate may take advantage of the condition<sup>2</sup> been departed from. Lord *Coke* explains of the passage by the following instances: for life be, &c., and the reversion is granted &c.: so (which is exactly this case), if lease be, &c., be, and the reversion is granted for years shall take benefit of the condition. In the next resolution, the distinction added by the lord chief justice is pointed out, 'the grantee of *part of the reversion* shall not take advantage of the condition: as, if lease be of three acres at a rent upon condition, and the reversion be granted in two acres, the *rent* shall be apportioned between the parties, but the *condition* is destroyed, as to the whole, entire, and against common right."

The other points are already sufficiently

MAULE, J. The main point attempted to be decided in this case has already been expressed by *Mature v. Westwood*, *Chaworth v. Philpott*, passages cited from *Co. Litt.* 215. a. That the grantee of *part of the reversion*, is within the statute 32 H. 8. c. 34.; but that



should have entertained no doubt, if there had been no case upon the subject: but, seeing that the point was settled nearly two hundred years ago, it would be idle further to argue it. I will not unnecessarily lengthen the case by adverting to the other grounds of demurrer, which also appear to me to have been well disposed of.

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V. WILLIAMS, J., concurred.

Judgment for the defendants.

*Pearson* asked leave to amend; but the court refused to grant it.

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TURNER v. FITT.

Nov. 17.

**ASSUMPSIT** by indorsee against acceptor of a bill of exchange.

The first count of the declaration was as follows: —

“For that whereas one *I. B. Doe*, on the 1st of *July*, 1842, made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the order of the said *I. B. Doe*, 46*l.* 8*s.* for value received, four months after the date thereof (which period had elapsed before the commencement of this suit); and the defendant then accepted the said bill; and the said *I. B. Doe* then indorsed the same to the plaintiff; and the defendant then promised the plaintiff to pay him the said bill, according to the tenor and effect thereof, and of the said acceptance and indorsement.”

A count on a bill of exchange — by indorsee against acceptor — alleged that “one *I. B. Doe*,” on &c., made his bill of exchange, &c. — The court refused to set aside as frivolous a demurrer assigning for cause that the drawer was described in the count by

the initials of his christian name only, without alleging any excuse for the omission of his christian name, or shewing that he was so designated in the bill.

*Semble*, that the omission is fatal on special demurrer.



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To this count the defendant demurred specially, assigning for causes — that the said first count was uncertain, in that it did not set forth the christian or first name of the drawer, and first indorser of the bill of exchange therein mentioned, and the allegation that one *I. B. Doe*, on &c., made his bill, and that the said *I. B. Doe* indorsed the same to the plaintiff, were respectively uncertain; that the said *I. B. Doe* was described in the said first count by the initials of his christian or first name, and not by his christian or first name, and no excuse was alleged for the omission to set forth the christian or first name of the said *I. B. Doe*, and it did not appear that he was so designated in the bill.”

*Hawkins*, on a former day in this term, obtained a rule nisi to set aside the demurrer as frivolous, or to amend the declaration. He cited *Braithwaite v. Harrison* (a), where, in an action upon a bill of exchange, by indorsee against acceptor, the declaration alleged that “one *J. Bankes*” made his bill &c., and the defendant demurred thereto, on the ground that the christian name of *Bankes* ought to have been set out in full, or that it should have been alleged that he was designated by the initial letter only in the original instrument; and *Wightman, J.*, set aside the demurrer as frivolous.

*Pearson* shewed cause. It has repeatedly been decided this objection is properly the subject of a demurrer. Thus, in *Apelmans v. Blanche* (b), it was held that the omission of the christian name of the acceptor of a bill of exchange (in an action not upon the bill), unless it be excused by averment, is ground of special demurrer: and *Parke, B.*, addressing the plaintiff’s counsel, said:

(a) 1 D. & L. 210.

(b) 14 M. & W. 154.



"If you had declared upon it as a written engagement, and had described the party as 'a certain person mentioned in the said writing as ——— *Marchand*,' it might have been sufficient; but, as it is, the declaration is defective, unless you can in every case leave out the christian names of the persons mentioned in the pleading. There is a special proviso in the 3 & 4 *W. 4. c. 42.*, as to bills of exchange, but that applies only to the names of the parties to the suit. You must amend." Again, in *Esdaile v. Maclean* (a), in an action by an indorsee against the drawer of a bill of exchange, the bill was stated to have been drawn upon "one *W. Watson*," and the count was held bad on special demurrer, *Parke, B.*, observing — "You cannot depart from the rule of the common law, without shewing that such is the designation of the party in the bill; otherwise you may, in every case, describe a party by his initials. You have no right under the statute to designate a party by his initials, unless he is so designated in the instrument; then you ought to shew that he was so designated." So, in *Levy v. Webb* (b), a declaration on a bill of exchange, by indorsee against acceptor, averred that "one *J. C. Pawle*" made his bill of exchange, which the defendant accepted, and that *J. C. Pawle* indorsed it to the plaintiff: and it was held ill on special demurrer. Lord *Denman* there said (c): "We must presume that every person has a christian name, and it ought therefore to have been inserted, unless some sufficient reason is assigned for the omission." And in *Langdale v. Maclean* (d), a demurrer to a count on a bill of exchange, by indorsee against drawer, on the ground that the initials only of the christian name of the acceptor (*W. W. Watson*) were

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(a) 15 *M. & W.* 277.(c) *Ib.* 410.(b) 15 *Law J., N. S., Q. B.*,  
407.(d) 10 *Jurist*, p. 642. *Bail*  
*Court.*



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set out, without any allegation that the party was designated in the bill, — was allowed. (a) The case of *daile v. Maclean* being cited, *Wightman*, J., said: "The court of Exchequer appear to have thought that this was a good ground of demurrer; and, where there are conflicting decisions, I certainly ought not to take upon myself the responsibility of setting aside a demurrer frivolous, and thus deprive a party of the power of taking the opinion of a higher tribunal." It is laid down broadly in *Stephen on Pleading* (b), that the Christian names of all persons, whether parties to the suit or not, should be stated in full in pleading, or the omission excused.

If the court should decide this question against the defendant, upon motion, they would deprive him of the opportunity of testing the propriety of the decision by writ of error.

*Hawkins* appeared in support of the rule: but, upon the court suggesting that he had better amend his declaration, — giving him the option of arguing the demurrer on the following day, but with an intimation that he must not, after argument, ask leave to amend — he elected to amend at once, on payment of costs.

Rule according

(a) i. e. the count was held to be bad. The *allowance* of a demurrer is a term applicable to the proceedings in a court of equity. *Vide* 1 *M. & G.* 202 n.

(b) 4th edit. 331.; 5th edit. 338.



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## FULLER v. FENWICK.

Nov. 24.

**C**OVENANT by lessor against lessee. The declaration stated, that, on the 19th of *April*, 1841, by a certain indenture then made between the plaintiff of the one part and the defendant on the other part, the plaintiff did demise, &c., unto the defendant a certain messuage or tenement, buildings, and pieces and parcels of land, particularly mentioned and described in the said indenture, &c., *habendum* to the defendant his executors &c.: that the defendant did, in and by the said indenture, covenant with the plaintiff, that he the defendant would, during the term in the said indenture mentioned, manage, farm, crop, and cultivate the lands thereby letten, according to the four-course system of husbandry (peas and beans, twice well hoed, not to be deemed crops), and would not sow any part thereof with colewort-seed (unless fed off), or sow any part thereof with hemp-seed, carraway-seed, coriander-seed, or teazle-seed; and would make yearly, during the said term, one fourth part of the arable lands by the said indenture letten, a good fallow (the tenant being allowed to sow sheep-feed among the wheat stubbles), or otherwise pay unto the plaintiff 20*l.* an acre *per annum* for every acre of the said arable lands which should be used, farmed, or tilled contrary to the true intent and meaning of the said covenant, and so in proportion for any greater or less quantity than an acre, over and above the rent reserved by the said indenture, and to be paid therewith, *or to be recovered by the plaintiff as ascertained and liquidated damages, &c., &c.* That, by virtue of the demise, the defendant entered, and became possessed, &c. Breach,—first, that, after the making of the indenture, and during the term

The court will not set aside, or refer back, an award for an objection in point of law not apparent on the face of it: as, upon a suggestion that the arbitrator improperly treated as a penalty that which was, by the express contract of the parties, stipulated and ascertained damages.

So, whether it is the award of a professional, or of a lay arbitrator.



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aforesaid, and whilst the defendant was so possessed of the said demised lands and premises, with the appurtenances, and every part thereof respectively, to wit, on the day of the commencement of the tenancy, and on divers other days and times between that time and the said determination thereof, he the defendant did not manage, farm, crop, and cultivate the lands thereby letten, according to the said four-course system of husbandry, and did not make one fourth part of the said arable lands in any year of the said term a good fallow, or pay unto the plaintiff 20*l.* an acre *per annum* for every acre of the said arable lands which were used, farmed, or tilled contrary to the true intent and meaning of the said covenant in that behalf, nor any sum of money in proportion, for any greater or less quantity than an acre, over and above the rent reserved by the said indenture; but, on the contrary thereof, after the making of the said indenture, and during the whole of the said term, that is to say, for four years from the making of the said indenture, which had elapsed before the commencement of the suit, managed, used, tilled, farmed, cropped, and cultivated a large part, to wit, one hundred acres of the said arable lands, in each and every year of the said term, contrary to, and on other and very different and less beneficial systems of husbandry than, the said four-course system of husbandry, and on very pernicious systems of husbandry, and contrary to the true intent and meaning of the said covenant in that behalf; and had not at any time paid unto the plaintiff 20*l.* *per annum* in respect of each of the last-mentioned acres of the said arable lands so used, farmed, and tilled contrary to the true intent and meaning of the said covenant in that behalf, although a large sum of money, to wit, 8,000*l.*, for and in respect of each of the same acres, and over and above the rent reserved by the said indenture, had, before the commencement



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of the suit, and after the expiration of the said term become, and was, and continued to be due and owing from the defendant to the plaintiff, for and in respect of such last-mentioned acres, at the said rate of 20l. an acre of such acres *per annum*, during such years as last aforesaid: and that, although, after the making of the said indenture, and during the said term, the defendant made in each year of the said term a fallow of a certain part of the said arable lands, to wit, one hundred acres thereof, yet that every part thereof so made a fallow as aforesaid was not made a good fallow, but, on the contrary thereof, was, during all the time aforesaid, made a bad fallow, contrary to the said covenant in that behalf. The declaration assigned three other breaches, and concluded with averring, that, by means of the premises, and of the said several breaches of covenant by the defendant, the plaintiff had been put to great costs and expenses of his moneys, to wit, to the amount of 100l., in repairing and reinstating the said farm and premises; and had been, by reason of the premises, and not otherwise, forced and obliged to re-let the same at a much less and lower rent, to wit, at a rent of 100l. *per annum* lower than he otherwise, and,—but for the breaches of covenant above assigned, and the impoverished and bad state and condition consequent upon, and incidental thereto,—he could, and might, and would have done, and had been and was otherwise injured, &c.

After setting out the indenture upon oyer, the defendant pleaded, amongst other pleas, to the first breach, that he did, from time to time, and at all times, after the making of the said indenture, and during the said term thereby granted, manage, farm, crop, and cultivate the lands thereby letten, according to the said four-course system of husbandry, and did make one-fourth part of the said arable lands in each year of the said term a good fallow,



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according to the true intent and meaning of the said indenture; and, to the second breach, that he did, from time to time, and at all times after the making of the said indenture, and during the said term thereby granted, make, in each year of the said term, the said acres of the said arable land in the said supposed breach of covenant secondly assigned, a good fallow, according to the true intent and meaning of the said indenture — concluding to the country.

By a judge's order, made by consent, on the 21st of *August*, 1846, the cause was referred to the award of a barrister, in whose discretion were to be the costs of the cause and of the reference and award. The order of reference contained a clause, that, "in the event of either of the said parties disputing the validity of the said award so to be made and published as aforesaid, or moving the court to set the same aside, the court should have power to remit the matters thereby referred, or any or either of them, to the reconsideration of the said arbitrator."

The arbitrator made his award on the 31st of *October*, 1846, as follows: —

"Whereas, &c., &c., now, I, the said arbitrator, having taken on myself the said reference, and having heard the evidence adduced before me on behalf of the said parties by their respective counsel and attorneys, and having duly and maturely weighed and considered the same, do, in pursuance of the said partly-recited order, award, order, and adjudge, that, as to the first issue joined between the parties in the said action, the defendant *did not*, from time to time, and at all times, after the making of the indenture in the defendant's plea set out, and during the term thereby demised, manage, farm, crop, and cultivate the lands thereby letten, according to the four-course system, in manner and form as he in his plea to the first breach in the declaration in



the said cause assigned, hath alleged; and I assess the damages due to the plaintiff for the said breach of covenant, at 1*l.* 15*s.* [A second, third, and fourth issue were determined in favour of the plaintiff.] And, as to the last issue, I find the same in favour of the plaintiff, in whose favour I also determine the said cause. And I do further order and award, that [each of them] the said plaintiff and defendant shall respectively bear and pay his own costs of the said cause, and that the plaintiff shall pay to the defendant the costs incurred by him in this reference, and shall bear and pay his own costs of the said reference, and shall further pay the costs of this my award."

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*Worlledge*, for the plaintiff, moved to set aside the above award, on the ground of an alleged "perverse mistake of law" on the part of the arbitrator, in treating the 20*l.* an acre as a penalty, instead of liquidated damages, or ascertained rent. The affidavits upon which the motion was founded, stated, that evidence was given by the plaintiff before the arbitrator, of a distinct breach of covenant on the part of the defendant, in cropping a portion of the demised land, consisting of seven acres, contrary to the four-course system of husbandry; that no evidence was offered in answer, nor was there any attempt, by cross-examination, to rebut the plaintiff's case in this respect; and that it was distinctly submitted to the arbitrator by the plaintiff's counsel, that the 20*l.* mentioned in the covenant of the lease, and thereby covenanted to be paid by the defendant for every acre of the arable land which should be used, farmed, or tilled contrary to the covenant, was not in the nature of a penalty, but of liquidated and ascertained damages; and the arbitrator was requested to look into the authorities upon the subject; but that the arbitrator had either made his award in haste, and without duly considering the



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point, or had mistaken the law. It also appeared from the affidavits, that a considerable body of evidence was given as to the other issues, that the case was closed (at *Bury St. Edmunds*) at seven o'clock in the evening of the 28th of *October*, and that notice of the award being ready was delivered in *London* on the 31st.

Since the cases of *Rolfe v. Peterson* (a), *Lowe v. Peers* (b),—in which latter case Lord *Mansfield* clearly pointed out the difference between a penalty and liquidated damages,—and *Jones v. Green* (c), it has been considered as firmly settled law that a clause of this sort does not constitute a penalty, but that the acreage is recoverable, upon a breach of the covenant, as stipulated damages. When a jury acts perversely in such a case as this, by omitting to give damages for the actual injury sustained, the court will direct a new trial—*Farran v. Olmius* (d): and there can be no reason why the same relief should not be afforded where a legal arbitrator has perversely mistaken a matter of law. That the court will take notice of legal misconduct in an arbitrator, is quite clear; see the judgment of this court in *Hall and Hinds in re.* (e) [*Wilde*, C. J. There are numerous decisions shewing that the court will not withdraw the matter from the judge whom the parties have themselves selected. (g) It is always competent to reserve

(a) 2 *Bro. P. C.* 436.  
 (b) 4 *Burr.* 2229.  
 (c) 3 *Y. & J.* 298.  
 (d) 3 *B. & Ald.* 692.  
 (e) 2 *M. & G.* 847., 3 *Scott, N. R.* 250.  
 (g) See *Wade v. Huntley*, 2 *Tidd Pr.*, 9th edit. 841.; *Chase v. Westmore*, 13 *East*, 357.; *Boutilier v. Thick*, 1 *D. & R.* 366.; *Sharman v. Bell*, 5 *M. & S.* 504.; *Badger in re*, 2 *B. & Ald.* 691.; *Richardson*

*v. Nourse*, 3 *B. & Ald.* 257., 1 *Chitt. R.* 674.; *Daker v. Barnes*, 1 *Taunt.* 48.; *Cress v. Craven*, 7 *Taunt.* 644., 1 *J. B. Moore*, 403.; *Cramp v. Symons*, 1 *Bingh.* 104., 7 *J. B. Moore*, 434.; *Gonsham v. Germain*, 11 *J. B. Moore*, 7.; *Perryman v. Steggall*, 3 *M. & S.* 93., 2 *Dowl. P. C.* 726.; *Jupp v. Grayson*, 3 *Dowl. P. C.* 199., 1 *C. M. & R.* 523.; *Ashton v. Poynter*, 3 *Dowl. P. C.* 199.



points of law for the opinion of the court, if the parties choose so to stipulate, rather than confide in the judgment and discretion of the arbitrator. Formerly, the courts were in the habit of setting aside awards for misreception, or improper rejection, of evidence by the arbitrator; but of late it is been clearly settled that the decision of the arbitrator in this respect is final.] This is not like the case of *Pinkerton v. Caslon* (a), where the attention of the arbitrator was not called to the particular claim: here, it is distinctly sworn that the point was made, and the arbitrator was requested to consider it.

This being a case in which the arbitrator has clearly and palpably mistaken a firmly-settled rule of law, the court will, at the least, exercise the power reserved to it by the order, and remit the matter to him for reconsideration.

WILDE, C. J. The question as to how far the court will interfere to correct the mistake of an arbitrator in fact or in law, has been presented in every possible shape. In some of the cases the discussion has proceeded upon a supposed difference, — where a matter of law was in question, — between a lay and a professional arbitrator. Lord *Ellenborough* first (b), and, subsequently, all the judges, repudiated any such distinction, holding, that, where the parties have thought fit to withdraw from the decision of the ordinary tribunals, and have selected their own judge, they must be content to abide his judgment. The question has also been discussed in cases where some point of law has suddenly arisen in the course of the inquiry, and where, though

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P. C. 201. (overruling *Perry-  
v. Steggall*); *Hardy v.* (a) 2 B. & Ald. 704.  
*Diagroso*, 1 H. & W. 185.; (b) In *Sharman v. Bell*, 5  
*Armstrong v. Marshall*, 4 Dowl.  
P. C. 593.; *Symes v. Good-*  
*win*, Ib. 642.



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the matter was present to the mind of the arbitrator, but little time was afforded for consideration; and the courts have said, that whether the arbitrator was a professional man or a layman, they would not inquire whether his conclusion was right or not, unless they could, upon the face of the award, distinctly see that the arbitrator, professing and intending to decide in accordance with law, had unintentionally and mistakenly decided contrary to law. The question, therefore, is, whether we can, from what appears on the face of this award, come to the conclusion that the arbitrator has decided this case in violation of some known principle of law. I am unable to trace the course of reasoning by which the arbitrator came to the conclusion he did. There is nothing on the face of the award to shew that he has done wrong. Without, therefore, intending to cast any doubt upon the general doctrine laid down in the cases cited, as to the proper construction of the covenant in question, it is enough to say that we are precluded, by the frame of the award, from interfering.

It is to be observed that these rules tend to create great delay and expense, and to defeat, in many cases, the object of the parties; having obtained the decision of the tribunal which they themselves have chosen, they have but little ground of complaint if its judgment should happen to be erroneous.

COLTMAN, J. It is not necessary on this occasion to express any opinion as to whether the plaintiff was entitled to receive 20% per acre for the breach of the defendant's covenant, or whether that was a matter to be compensated in damages. If that were the point to be determined here, it might require more consideration. But I agree with the lord chief justice, that the award does not, upon the face of it, shew that the arbitrator has made any mistake in point of law; and we cannot as-



ume it from what is presented to us in the affidavits.  
therefore think there should be no rule.

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MAULE, J. I also think that no rule should be granted in this case. If the case had been left to follow the ordinary course, it would have been decided, as to the facts, by a jury, and, as to the law, by the judge, with an ultimate appeal to a court of error. The parties, for some reason, thought fit to withdraw the case from that mode of trial, and to refer the whole to an arbitrator, thinking, probably, that the facts would be more conveniently ascertained, and the law more conveniently determined by one from whose judgment there was no appeal, and that an arbitrator would, in the particular case, be a better judge of the facts than a jury, and of the law than the court. It is quite true that it is sometimes advantageous to have a matter decided by a person possessing the smallest possible knowledge of law. These considerations have, in modern times, induced the courts to deal much more liberally with awards than was formerly their practice, and, generally speaking, to hold them to be final, unless some substantial objection appears upon the face of them. There is nothing upon the face of this award to shew that the conclusion the arbitrator has come to is not a perfectly just and right one. I cannot say that the arbitrator may not have been quite right in assessing the damages for the breach of covenant at the sum he has awarded, instead of assessing them at the rate of 20% per acre. This is not like the case of *Farrant v. Lezardus*. There the covenant was simply a covenant to pay an additional rent of 50% for every acre that should be ploughed up; whereas, here, the complaint is, not simply that the defendant did not pay the additional rent, but, in the alternative, that he did not cultivate the land according to a given system, or pay the 20%.



1846. an acre. In such a case, it may or may not be imperative on a jury to assess the damages at the 20*l.* an acre, and an arbitrator may be forgiven if he decide according to what occurred to him to be the justice of the case.

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V. WILLIAMS, J., concurred.

Rule refused.

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KENT v. The GREAT-WESTERN-RAILWAY  
Company.

Nov. 23.

By a railway act it was enacted, that no action should be brought for anything done or omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by the act, unless twenty days' previous notice in

THIS was an action of assumpsit for money had and received, brought to recover 650*l.* for alleged overcharges demanded and taken by the *Great-Western Railway Company* from the plaintiff, a carrier between *London* and *Abingdon*.

Before the commencement of the action, the plaintiff caused the defendants to be served with a notice of action under the 223rd section of the 5 & 6 *W. 4. c. cvii.* The notice referred to nine several books of account delivered therewith, containing minute details of the alleged overcharges.

The writ of summons, which was sued out on the 25th of *June*, 1845, was indorsed for 650*l.* debt, and 2*l.* 5*s.* costs.

writing should be given. The company having, contrary to the provisions of the act, made excessive charges for the carriage of goods, and claimed and received the amount of such charges from the plaintiff: — Held, that in an action for money had and received brought to recover back the sums so extorted, the company were entitled to a notice of action.

The sum indorsed on the writ for costs was 2*l.* 5*s.* only. On taxation, the master allowed 133*l.* 12*s.* 2*d.* costs in respect of the notice of action; the only objection urged before him being, that the plaintiff was not entitled to any costs incurred prior to the issuing of the writ, no exception being taken as to their amount. The allowance of costs for the notice of action was held to be proper; and the court refused to enter upon the question of amount.



The declaration was delivered on the 12th of *July*, 1845, and with it particulars of demand, as follows:—

“This action is brought to recover of the said company the following items of claim, viz.:—

“To amount of overcharges made by the company to the plaintiff, and paid by him to them, for the carriage of goods by the *Great Western Railway Company*, between the 1st of *October*, 1842, and *April* the 30th, 1844, *the full particulars of which, with the dates and items, have already been delivered to the company, in the plaintiff's notice of action*, and in four books of account therein referred to, and respectively marked O. No. 1., O. No. 2., O. No. 3., and O. No. 4. The plaintiff claims for these overcharges, 175*l.* 7*s.* 3*d.*

“To amount of further overcharges made by the company to the plaintiff, and paid by him, to them for the carriage of goods on the lines of railway worked by the company, between *May* the 1st, 1844, and *January* the 31st, 1845, *the full particulars of which, with the dates and items, have already been delivered to the company, in the plaintiff's notice of action*, and in five books of account therein referred to, and marked respectively K. No. 1., K. No. 2., K. No. 3., K. No. 4., and K. No. 5. The plaintiff claims, for these overcharges, 264*l.* 8*s.* 4*d.*

“To an allowance or discount of 10 *per cent.* on the company's charges, to the plaintiff, for goods carried for the plaintiff on the said lines of railway, between *May* the 1st, 1844, and the 31st of *January*, 1845, being the same allowance of 10 *per cent.* mentioned in an agreement made by the company with the plaintiff, which is set forth in the first count of the declaration herein, *and the full particulars whereof have also been delivered to the company in the said notice of action*, and the said last-mentioned five books of account therein referred to. The plaintiff claims for this allowance 201*l.* 10*s.*

“The plaintiff also seeks to recover such other da-

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gages as a jury may give for the breach of the agreement set forth in the said first count, and interest at 5 *per cent.* on the said several sums above mentioned, from the respective times at which the same, or any portions thereof, were paid, until final judgment in this action."

On the 21st of *July*, the defendants took out a summons calling on the plaintiff to shew cause why he should not deliver "a further and better account in writing of the particulars of the plaintiff's demand for which this action was brought, distinguishing which of the sums in the particulars delivered, were claimed under each count; and why each count should not be limited to different and distinct causes of action." This summons was attended on the 23rd, when *Wightman, J.*, declined to make any order for further particulars, *in consequence of the full particulars* which had been furnished to the company by the notice of action and the books of account therein referred to.

The cause was tried before *Tindal, C. J.*, at the sittings in *London* after *Hilary* term, 1846, when a verdict was found for the plaintiff for 18*l.* 4*s.* 11*d.* over and above a set-off claimed and proved by the defendants.

Upon the taxation of the plaintiff's costs, the master allowed the following items of charges preliminary to the action: —

	£	s.	d.
" Letter for payment - - -	0	3	6
" Instructions for very special notice of action - - -	2	2	0
" Drawing same, upwards of 2500 folios	125	0	0
" Fee to counsel to settle - -	5	10	0
" Attending him - - -	0	6	8
" Service of notice of action, &c. -	0	10	0

The allowance of these items was objected to before the master, on the ground, that, as the writ was the



tion of the action, and the costs indorsed thereon £5s. only, the plaintiff was concluded thereby, as the master had no power to allow the plaintiff charges for preliminary proceedings.

Application was afterwards made to a judge at chambers for a reviewal of the taxation. The judge thereon ordered, that, on payment of the damages and undisputed items of the bill of costs, the disbursements should stand over until *Michaelmas* term.

*Wells*, Serjt., accordingly, on the second day of March, obtained a rule nisi for a reviewal of the taxation in respect of these last-mentioned items. He held, that, although a notice of action might have been necessary, it was not necessary to give it with all the minuteness of a particular of demand, which the defendants might call for, or not, at their election.

*Burd*, Serjt., and *J. Brown*, shewed cause. The nature of action here was similar to that in *Parker v. Great-Western-Railway Company* (a), in which case no notice of action was given, the costs of which were allowed on taxation. The 223rd section of the Railway's act of incorporation, 5 & 6 W. 4. c. cvii.,

“that no action, suit, or information, nor any proceeding of what nature soever, shall be brought, commenced, or prosecuted against any person, for any one, or omitted to be done, in pursuance of this act, in the execution of the powers or authorities, or the orders made, given, or directed, in, by, or under this act, unless twenty days' previous notice in writing shall be given by the party intending to commence and prosecute such action, suit, information, or proceeding, to the intended defendant.” The

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(a) 7 M. & G. 253., 7 Scott, N. R. 885.



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question is, whether that which is the foundation of this action was a thing done in pursuance of the act, or in the execution of the powers or authorities given by the act. Though, in point of form, an action for money had and received, this is in reality an action to recover compensation for a series of torts committed by the company. In *Parker v. The Great-Western-Railway Company*, it was urged on behalf of the company that they could be sued only in case: but the court held otherwise (a): indeed, it would be absolutely impracticable to sue in that form, the overcharges being more than fourteen thousand in number; in case, each would require a separate count. (b) The act of parliament is framed upon the supposition that the company were about to construct a new line of road, which the public were to be at liberty to use with their own carriages and locomotives. It contemplates the possibility of the company themselves becoming carriers: the 164th, 165th, 166th, and 167th sections empower them to take tolls; and the 175th section provides that the charges shall be reasonable, and equal to all parties using the line. *Willet v. Tidey* (c), *Greenway v. Hurd* (d), and *Boyd v. The Croydon-Railway Company* (e), shew that the right of the defendants to a notice of action does not depend upon the form of the action. In *Waterhouse v. Keen* (g), by a turnpike act, it was enacted that no action should be commenced against any person for any thing done in pursuance of the act, until twenty-one days' notice should be given to the clerk of the trustees, or after six calendar months next after the fact committed, &c.;

(a) And see *Pickford v. The Great-Western-Railway Company*, 8 M. & W. 372., 10 M. & W. 399., where case was brought for a refusal to carry, after a tender.

(b) *Quære.*  
 (c) 1 Show. 214.  
 (d) 4 T. R. 553.  
 (e) 4 N. C. 669., 6 Scott, 461., 6 Dowl. P. C. 721.  
 (g) 4 B. & C. 200.



was held, in assumpsit against a toll-collector, to recover back money alleged to have been by him improperly as toll, that twenty-one notice of action ought to have been given. *Bay-* there said: "It is true that many of the expressions that clause seem to point to actions of tort; but material to consider the substance, rather than the form, of the action. In many cases the subject-matter of the action is substantially tort, but the plaintiff waives that tort, and brings assumpsit. If an action is brought in consequence of a thing substantially done in pursuance of the act of parliament, it is a case governed by the act." And *Holroyd, J.*, said: "The defendant's taking the toll was an act done in pursuance of the act. This is a case, therefore, within the provisions of the act. It is a case also within the mischief intended to be avoided by the act of parliament. The toll was collected by the lessee. It is consistent, therefore, with the object of this enactment, if he improperly exacted any toll, that he should have an opportunity of making amends. The same mischief would arise from his neglect to give the notice in such an action as if it were an action of tort." So, in *Smith v. Kent*, an act of parliament established a company for the building and maintaining certain docks and basins, and authorised them to appoint a dock-master, who was to have power to direct the mooring, &c., of all vessels coming in, being in, the docks, and to have the control over the wharves of one hundred yards of the entrance into the docks, so far as related to the transporting of vessels in or going out; and the company was to be managed in the name of their treasurer; and, if any action should be brought against any person *for any thing done*

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(a) 10 B. &amp; C. 277., 5 M. &amp; R. 225.



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*in pursuance of the act*, such action was to be commenced within six calendar months after the fact committed. An action having been brought against the treasurer of the company for an injury done to a vessel (within one hundred yards of the entrance of the docks) by reason of improper directions having been given by the dock-master in transporting her into the docks — it was held that the giving of such directions was a thing done in pursuance of an act of parliament, and that the action ought therefore to have been brought within six calendar months after such directions were given. [*Wilde, C. J. referred to Sellick v. Smith. (a)*] The point was also much discussed in the recent case of *Charrinton v. Johnson*. The cases of *Morgan v. Palmer (c)*, *Palmer v. The Grand-Junction-Railway Company (d)*, and *Carpue v. The Brighton-Railway Company (e)*, which will probably be relied on for the defendants, are plainly distinguishable. In the first of these cases, the matter complained of could in no sense be said to be an act done by virtue or under colour of the defendant's office of justice of the peace: in the last two, the defendants were acting in the capacity of common carriers, and were therefore altogether out of the protection of their respective acts. Here, however, the company were clearly acting in the supposed execution, and under colour of, the act of parliament, although not in obedience to it: and no prudent person could, under the circumstances, have advised the plaintiff to commence his action without a previous notice. The principle of construction applied to these acts, is, that where there be any ambiguity in the clauses imposing tolls or duties, they are to be construed most strongly against the company, and in favour of the public (g): *Barrett v.*

(a) 11 *J. B. Moore*, 459.,  
 2 *C. & P.* 284.  
 (b) 13 *M. & W.* 856.  
 (c) 2 *B. & C.* 729.  
 (d) 4 *M. & W.* 749.

(e) 5 *Q. B.* 747.

(g) Such a construction would seem rather to assist those who contended that notice of action was not necessary.



*The Stockton-and-Darlington-Railway Company.* (a) As well, therefore, upon authority as upon principle, this is a case in which a notice of action was necessary. A notice of action which had not supplied, the information here given, would not have enabled the defendants to tender amends: and, if the notice had not been accompanied by the account of overcharges, the defendants must necessarily have required them in the shape of particulars. The particulars delivered with the declaration do, in fact, refer to, and incorporate, these accounts. [Channell, Serjt., intimated that he should insist, that, assuming a notice of action to be necessary, the master was not justified in allowing the charge to the extent he did.] It does not appear from the affidavits that any such point was made before the master: and it is not competent to a party to ask for a reviewal of taxation, upon grounds for the first time suggested on the motion. Clearly the plaintiff is not precluded by the indorsement of the writ from recovering the charges in question: *Bowdidge v. Slaney* (b); *Jacquot v. Boura*. (c) The amount to be allowed was purely in the discretion of the master.

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*Channell*, Serjt., and *Keating*, in support of the rule. It will not be contended, on the part of the defendants, that their right to notice is affected by the form of the action. But it is insisted, upon the authority of *Palmer v. The Grand-Junction-Railway Company*, and *Carpue v. The Brighton-Railway Company*, that here the defendants were acting, not in pursuance or in execution of the powers given to them by the act, but as common

(a) 2 M. & G. 134., 2 Scott, N. R. 337.; affirmed on error in the Exchequer Chamber, 3 M. & G. 956., 3 Scott, N. R. 803., and in the House of Lords, 7 M. & G. 870., 8 Scott, N. R. 641.

(b) 2 N. C. 142., 2 Scott, 197., S.C. per nom. *Bowditch v. Slaney*, 4 Dowl. P. C. 140.

(c) 5 M. & W. 155. S. C. per nom. *Jacquot v. Boura*, 7 Dowl. P. C. 331.



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carriers. In the former of those cases, the act of incorporation, 3 W. 4. c. xxxiv. s. 214. provided that no action, &c., should be brought, &c., against any person, *for any thing done, or omitted to be done, in pursuance of the act, or in the execution of the powers or authorities, &c.*, unless fourteen days' previous notice in writing should be given by the parties intending to commence such action, &c. In an action against the company (alleging them to be owners and proprietors of the railway), for not safely carrying and conveying certain horses in their carriages on the railway, whereby one was killed, and others were injured: it was held that the company were not entitled to notice of action, as for a thing done, or omitted to be done, in pursuance of the act. *Parke, B.*, in delivering the judgment of the court, there says: "If the action was brought against the railway company for the omission of some duty imposed upon them by the act, this notice would be required. If, for instance, it was founded on a neglect in not duly fencing the railway, on account of which the travelling on it was dangerous to those passing along it, assuming that such an obligation resulted from the 180th section, or from the general purview of the act, that case would have fallen within the 214th section. But, when the matter is looked at and explained, it appears that the action is not of that nature, but the defendants are sued as common carriers, who have received nine horses for the purpose of being taken to their journey's end, which they have not so delivered, but that, on the contrary, one has been killed, and others severely injured, in consequence of an accident on the railroad: the action is brought against them, therefore, in their character of common carriers: and it appears to me that a breach of their duty in that character is not a thing omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by it. The act does not compel them to be common carriers; it only enables



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m to be so, so far as they shall think fit; and, when  
y have elected to become so, they are liable in that  
racter in the same way that other common carriers  
” [Maule, J. What the company did in that case,  
y could have done without the assistance of the act:  
not so here.] It may be that the plaintiff’s remedy  
es out of the provisions of the act, and yet that  
defendants derive no authority or protection there-  
n. *Carpue v. The London-and-Brighton-Railway*  
*pany* is precisely in point. That company, by  
r act, 7 W. 4. & 1 Vict. c. cxix., were empowered to  
e the railway, which all persons were to have liberty  
se with carriages, &c., on payment to the company  
olls regulated by the act; the company were also  
owered to provide locomotive engines on the rail-  
, and to charge for the use of them, and to use loco-  
ive engines and carriages for the conveyance of  
engers, goods, &c., and to charge for such convey-  
e, in addition to the toll, within a limited amount:  
it was enacted that no action or proceeding should  
rosecuted against any person or corporation *for any*  
*g done, or omitted to be done, in pursuance of the act,*  
n the execution of the powers or authorities given  
t, without twenty days’ notice in writing. A declar-  
n, in case, against the company, charged that they  
e owners of the railway, and of carriages used by  
n for the conveyance of passengers along it, for  
rd; that, they being owners of the railway and  
riages, the plaintiff, at their request, became a pas-  
er in one of the carriages, for reward to them, and  
received him as such passenger, and it became  
duty to use due care and skill in conveying him:  
ch, that they did not use due care and skill in con-  
ng him; but took so little care, and so negligently  
unskilfully conducted themselves in carrying him,  
managing the carriage in which he was a passen-



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ger, the train to which it was attached, and the engine whereby it was drawn upon the company's railway, that the carriage was thrown off the rails, and the plaintiff injured: it was held that no notice of action was necessary, the company being sued in their capacity of carriers, and not for any thing done or omitted under the special authority of the act; although, for the purpose of shewing that the accident occurred from a speed that was improper under the circumstances, evidence was given that the rails were defective at the spot.

Assuming this case to be governed by the 223rd section of the act, and that a notice of action was necessary, the master was not justified in allowing so large a sum as 133*l.* 12*s.* 2*d.* [*Wilde, C. J.* This point was not made before the master. Upon a motion of this sort, the affidavits ought distinctly to point to the particular objection, and to shew that the attention of the officer was called to it.] The rule of court of *Hilary* term, 2 *W.* 4. § 11., contemplates that the defendant shall in all cases have the option of staying the proceedings upon payment of the sum indorsed on the writ for debt and costs. The plaintiff clearly could not, in that indorsement, claim the costs of such a notice as this. (a) [*Maule, J.* The only authority for giving costs at all, is the statute of *Gloucester* (b), which gives to the plaintiff the costs of his "writ purchased:" why may not the costs of the notice be included in the indorsement as part of the costs of the writ purchased?] The language of the rule shews what costs were intended.

COLTMAN, J. (c) This case appears to me to be distinguishable from *Palmer v. The Grand-Junction-*

(a) The indorsement is to state the amount of the debt, and "the amount of what the plaintiff's attorney claims for the costs of such writ or process, arrest, or copy and service, and

attendance to receive debt and costs."

(b) 6 *Edw.* 1. c. 1.

(c) *Wilde, C. J.*, having been of counsel in the case, took no part in the judgment.



*Railway Company and Carpus v. The London-and-Brighton-Railway Company.* In those cases, the companies were in the performance of the ordinary duties of common carriers. Here, however, the defendants were professing to act solely and entirely under the authority of their acts of parliament. They were, therefore, clearly entitled to notice of action. If there was any ground for objecting to the amount of the charge for such notice, that should have been urged before the master. That was not done; the only point made being that the plaintiff was not entitled to recover in respect of *any* costs incurred prior to the issuing of the writ.

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MAULE, J. I am of the same opinion. I think the subject-matter of charge in this action clearly was a thing done, or omitted to be done, in pursuance of the act. The act enables the company to carry goods, charging a sum consisting of such toll as they choose to take, plus a reasonable sum for the carriage. The plaintiff and the defendants are in reality trying in an action of assumpsit (which makes no difference) whether, *under the act*, the defendants were entitled to charge certain prices. It is scarcely possible to conceive a case more distinctly within the purview of the act. The company were doing what they considered to be in pursuance of the act: and therefore the case is clearly one in which a notice of action was necessary. The act of parliament in question passed after the making of the rule requiring the indorsement of the debt and costs on the writ; and it, in effect, provides that no writ shall issue against the company for any thing done, or omitted to be done, in pursuance of the act, or in the execution of the powers or authorities given by it, unless twenty days' previous notice shall have been given. It would be a very unjust thing if the company could defeat the



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action if no notice were given, and yet have the option of avoiding the costs of such a notice by paying the sum demanded, and 45s. for the writ and service, within the four days.

I think the amount was proper for the master's consideration. It does not appear to have been suggested before him that the sum charged was excessive; it is therefore clearly too late to urge that objection now.

V. WILLIAMS, J., concurred.

Rule discharged, with costs.

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BRADLEY v. GRAY.

Nov. 17.

In debt on a judgment, the declaration alleged that the plaintiff recovered a judgment against the defendant "in the court of our lady the Queen, of Her Bench here at *Westminster*, in the county of *Middlesex*."

The defend-

ant pleaded "that there was not any record of the said supposed recovery remaining in the said court of our lady the Queen, before the Queen Herself at *Westminster* (named in the declaration the court of our lady the Queen of Her Bench at *Westminster*), in manner and form as in the declaration alleged." The plaintiff replied, "that there was such a record of the said recovery remaining in the said court of our lady the Queen of Her Bench here, in manner and form as the plaintiff had in the said declaration above alleged :"—

Held, that the plaintiff proved the affirmative of the issue, by the production of a record of a judgment recovered in this court.



court of our lady the Queen, before the Queen herself at *Westminster* (named in the declaration the court of our lady the Queen of Her Bench at *Westminster*), in manner and form as in the declaration above alleged.

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The plaintiff replied, that there is such a record of said recovery remaining in the said court of our lady Queen, of Her Bench here, in manner and form as plaintiff hath in the said declaration above alleged.

Pearson, for the plaintiff, now prayed judgment, upon production of the record of a judgment of this court, corresponding with that mentioned in the declaration.

Wash, for the defendant, objected, that the record produced did not sustain the issue, the declaration in it stating a judgment recovered in the court of Queen's Bench, though stating it informally; and that plaintiff could not assert that the plea was not an answer to the action, for, in that case, no issue properly joined, he could have no judgment.

Pearson, for the plaintiff. The declaration describes in a sufficient degree of accuracy a judgment of this court. It certainly does not accurately describe a judgment recovered in the Queen's Bench. The ordinary name of that court is—"The court of our lady the Queen before the Queen Herself."

If there is in this respect a variance, it may, according to the opinion of *Alderson, B.*, in *Hopkins v. Francis (a)*, be amended under the 9 G. 4. c. 15. If it is possible so to do, the court will read the plea in such a sense as to make it a good answer, in point of

(a) 13 M. & W. 668., 2 D. & L. 664., 14 Law J., Exch. S. 207.



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law to the declaration; and, as the declaration substantially alleges a judgment recovered in this court, according to the language of the judgment upon such an issue as here joined (*a*),—"it sufficiently appears to the court that there is such a record of recovery against him the said defendant at the suit of the said plaintiff, as he the said plaintiff hath above in that behalf alleged."

WILDE, C. J. There has been considerable want of care and caution in this case on both sides. But, upon the whole, I am inclined to think the plaintiff is entitled to judgment. The declaration states that the plaintiff recovered a judgment against the defendant "in the court of our lady the Queen of Her Bench here, at *Westminster*, in the county of *Middlesex*." That, though not very accurate, is still, I think, a sufficient description of this court: at all events, it would be much more inaccurate as applied to the court of Queen's Bench. The defendant pleads, that there is not any record of the said supposed recovery remaining in *the said court of our lady the Queen, before the Queen Herself, at Westminster* (named in the declaration the court of our lady the Queen of Her Bench at *Westminster*), in manner and form as in the declaration alleged; thus identifying the court as the court before mentioned, but choosing to give it an incorrect description. The plea must be read as intended to be an answer to the declaration. The answer in substance is, that there is no such record as alleged in the declaration. If the plea had merely alleged that there was not any record of the said supposed recovery remaining in *the said court*, in manner and form as in the declaration alleged, that would have been sufficient: and the effect

(*a*) See *Tidd's Forms*, 8th edit. 256.; and see *Impry, C. P.* 339.



f the plea is not varied by giving the court a different name, yet pointing to the court mentioned in the declaration, and shewing that it is intended to traverse the allegation therein in manner and form. Then comes the replication, re-asserting that there is such a record of the said recovery, remaining in the said court of our Lady the Queen of Her Bench here, in manner and form as the plaintiff had in the declaration above alleged. It appears to me that that sufficiently presents an issue — whether or not there is such a record as is mentioned in the declaration and in the replication ; and, consequently, that the plaintiff, by the production of the record shewing a judgment recovered in this court, sustains his issue against the defendant. It will be open to the defendant, if so advised, to question this decision by writ of error.

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COLTMAN, J. The view taken by the Lord Chief Justice is probably the correct one ; but there is, as it seems to me, another view that would equally justify a judgment for the plaintiff, assuming that the declaration sufficiently alleges a judgment recovered in this court. The defendant pleads no record of a judgment in the Queen's Bench. He has, therefore, confessed the declaration, and has suggested nothing that amounts to an answer to it. Whether any proper issue is joined or not, it seems to me that the plaintiff is entitled to judgment on the whole record.

MAULE, J. I also think the plaintiff is entitled to judgment. The issue of *nul tiel record* involves two questions, one of fact, and one of law. The first is, whether such a record as is alleged, does in fact exist ; the second is, what judgment is to be pronounced upon the fact of the existence of such a record as is produced. The issue being joined, a day is given for the production of the record mentioned in the declaration, which is the



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record about which the inquiry is instituted. Now, the declaration in this case professes to describe a record of a judgment recovered in this court, not with strict technical accuracy, but so describing it as to shew beyond doubt that this is the court that is meant. That being so, it appears that the record upon which the plaintiff relies, is a record of this court. I am disposed to think the true sense of the plea is to be taken to be, a denial of the existence of such a record as is mentioned in the declaration, with an unimportant comment upon the description of the court in the declaration. But, if this were otherwise, the plea would stand upon the footing of one introducing new matter having nothing to do with the real point in question between the parties. In either view the plaintiff is entitled to judgment.

If we are wrong in the sense we impute to the plea, the defendant will have a remedy by writ of error.

V. WILLIAMS, J., concurred.

Judgment for the plaintiff.

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PILBROW v. PILBROW'S-ATMOSPHERIC-RAILWAY-  
 AND-CANAL-PROPULSION Company.

Nov. 23.

A writ of summons describing a public company, as "now or late carrying on business in

*King-William Street*, in the city of *London*," was served upon a director at *Barnet*, in *Middlesex* : — Held, that both writ and service were irregular. (a)

THE plaintiff had obtained letters-patent for alleged "improvements in the machinery for, or a new method of, propelling carriages on railways," &c. On the 11th and 12th of *June*, 1845, he by deed granted to the defendants, — a company that had, on the 31st of

(a) *Vide post*, 735. (c).



preceding, obtained a certificate of complete registration under the sixth section of the 7 & 8 *Vict. c. 110.*, entitled “An act for the registration, incorporation, and regulation of joint-stock companies,” — the sole licence authority to use the letters-patent, for certain contrivances therein mentioned. In the register the company was described as of “No. 6. *King-William Street*, in the city of *London*.”

An action having been commenced against the company to enforce the performance of these contracts, the writ described them as “*Pilbrow's-Atmospheric-Railway-and-Canal-Propulsion Company*, now or late carrying on business in *King-William Street*, in the city of *London*.” For the purpose of serving the writ upon the secretary of the company, the plaintiff's attorney caused inquiry to be made at No. 6. *King-William Street*, and ascertained that the company had given up office, and that neither the secretary nor any other officer then attended there. The plaintiff thereupon served the writ of summons, and a copy, to the solicitors of the company, who, however, declined to give an undertaking to appear thereto. The plaintiff then caused a copy of the writ to be served upon *Francis Lambert*, one of the directors of the company, who had acted in the concerns of the said company, and testified by his signature his assent to the common seal of the said company being affixed to the contracts and deeds of the 11th and 12th of *June* ;” *Lambert* being the only director, except two, then resident in *England*. The service was effected at *Lambert's* residence, *New Lodge*, near *Barnet*, in the county of *Middlesex*, which, as sworn, was not within two hundred yards of the border of the city of *London*.

*Bovill*, on a former day in this term, — upon affidavits disclosing the above facts, and also alleging that *Lam-*

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*bert* had not been served with any other process said action than the copy annexed to the a before described; that he never had residence any place of business or abode, or carried on business, at *King William Street*, in the city of that, at the time of the issuing of the said company had not, and from thence hitherto had, any office, place of business, clerk, secretary, officer, director, agent, or servant at *William Street* aforesaid; that *Lambert* was not, had been, a head officer, clerk, or treasurer, tary of the said company, or an agent or employed by the said company; that the deponent (*bert*) verily believed that he was intentional with the said copy writ of summons, as a member of the said company, for the purpose of founding proceedings upon such service against the company; and that the said company had not been incorporated by any act of parliament passed since the passing of the companies' consolidation act, 1845, — obtained a rule nisi to set aside the summons and copy, and the service thereof, on one of them, with costs. The objections were overruled by the writ, that it contained no sufficient description of the residence of the company — and, to the service had not been effected in the manner prescribed by the companies' clauses' consolidation act, 8 & 9 V. c. 135. (a); that *Lambert* was not so connected with the said company as to make a service upon him bind

(a) Which enacts that "any summons or notice, or any writ or other proceeding, at law or in equity, requiring to be served upon the company, may be served by the same being left at, or transmitted through the post directed to, the principal

office of the company, or of their principal office there shall be more or being given personally to the secretary, or, in case there be no secretary, then given to any one director of the company."



company (a); and that it was effected in a foreign

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found, Serjt., now shewed cause. This is not a within the terms of the 2 W. 4. c. 39. s. 1. (b): and nothing has been done that under the circumstances be done to comply with the 135th section of the Vict. c. 16. In *Hill v. Harvey* (c), it was held not to describe a defendant, in a writ of capias, the of *Devonshire-Terrace, New Road*," no other place or means of description being known: and in *v. Langford* (d), "Captain *Langford*, of the *East-India* Company's ship *Kelly Castle*, and now likely to be found at the *East-India* House, in the City of *London*," was held sufficient, — being a place at which the defendant might reasonably be expected to be met with. With respect to the service on *Lambert*, the writ being against the company only by their corporate name, he is not in a situation to appear here to answer to the writ or the service, without identifying himself with the company. [*Channell*, Serjt., referred to *son v. Thorne* (e), where it was held that a party served, was at liberty to appear and urge an objection to the writ, without admitting himself to be the company,

The seventh section of W. 4. & 1 Vict. c. 76. that "every writ of summons issued against a corporation, may be served on the mayor or other head or on the town-clerk, treasurer, or secretary of the corporation."

Which prescribes the effect of the writ of summons, enacts, that, "in every writ and copy thereof, the place and county of the residence or supposed residence

of the party defendant, or wherein the defendant shall be, or shall be supposed to be, shall be mentioned"; "and every such writ may be served, in the manner heretofore used, in the county therein mentioned, or within 200 yards of the border thereof, and not elsewhere."

(c) 2 C. M. & R. 307., 5 Tyrwh. 971., 1 Gale, 185., 4 Dowl. P. C. 163.

(d) 2 Dowl. P. C. 498.

(e) 13 M. & W. 149., 2 D. & L. 230.



seems to be an answer to the objection to heard. [Maule, J. Supposing that difficulty got over, how can you justify a service in the county of *Middlesex*? The only use of the county at all in the writ of summons, is where the plaintiff chooses to serve it.] *Street* being the only place of which the county can be described, the writ could not issue in that form. The first section of the 2 *W. 4. c.* applies to the case of corporations, whose members all reside out of the county or place where the corporation is carried on. [Coltman, J. could you not have applied for a *distring*?] It would be great difficulty in making such an affidavit would satisfy the court or a judge, that the *dwelling-house* had been used to serve the writ [Coltman, J. It does not occur to me that there would be much difficulty in making an affidavit to satisfy the requisitions of the 2 *W. 4. c.* that the *dwelling-house* may well be doubted whether a *distring* could be made against an incorporated company. The 2<sup>d</sup> section requires the affidavit to shew attempts to serve the writ at the *dwelling-house*. [Maule, J. That is not done by the act of parliament, but is merely a matter of practice of the court. It is not a public company that has not taken the name of a public company.]



has no public officer.] In *Evans v. The Dublin-and-Drogheda-Railway Company* (a), the court of Exchequer held the service of a writ of summons on a director of the company in this country to be bad, their office being in *Dublin*: but, there, the act incorporating the company provided a particular mode of service, and the company was not directly amenable to the jurisdiction of the *English* courts.

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*Channell*, Serjt., and *Bovill*, in support of the rule. No particular mode of service being prescribed, the plaintiff was bound to sue out his writ in conformity the directions of the 2 *W. 4. c. 39. s. 1.* If the existing place of business of the company were unknown, it might be sufficient to describe them as “late of No. 6. *King-William Street*, in the city of *London*,” *Norman v. Winter*. (b) The company being so described in the register, they might be precluded from saying that they had no place of business there. The introduction of the words “or late” creates an ambiguity that makes the writ bad. The 2 *W. 4. c. 39. s. 1.* expressly requires “the place and county of the residence or supposed residence (c) of the party defendant” to be mentioned in the writ, and the service to be “in the county therein mentioned, or within two hundred yards of the border thereof, and not elsewhere.” A service in one county, of a writ directed to a party as resident in another, clearly cannot be sustained.

(a) 14 *M. & W.* 142., 2 *D. & L.* 865.

(b) 5 *N. C.* 279., 7 *Scott*, 51., 7 *Dowl. P. C.* 304.

(c) In the case of an *incorporated* company — an *incorporated* defendant — a mere *entia*, existing only in contemplation of law, whose resi-

dence is *in nubibus* — a different mode of service is provided; *suprà*, 732 (a). *Quære*, whether this registered company is not placed in the same position as an incorporated company; *vide antè*, 16, 730, 733 (a), *post*, 736 (b).



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WILDE, C. J. This case comes before the court upon two distinct objections — first, that the writ of summons is irregular on the face of it, for not correctly describing “the residence or supposed residence of the party defendant” — secondly, that the service has not been in compliance with the statute 2 *W. 4. c. 39*. The act requires the place and county of the residence, or supposed residence, of the party defendant, to be mentioned in the writ. Here, the writ describes the defendants as “now or late carrying on business in *King-William Street*, in the city of *London*.” This is very ambiguous. If the plaintiff had meant to treat *Barnet* as the place of residence of this company, — which possibly he might have done, — he should have said so in distinct terms. Or, it might be that the company would be bound by a description of them as of the place of which they are described in the register. But, upon the face of it, this writ does not conform to the practice: and the objection is one that cannot be cured.

Then, as to the service. The place of residence described in the writ is, in the city of *London*. *Lambert* was served at *Barnet*, in the county of *Middlesex*. The first section of the 2 *W. 4. c. 39*. requires the service to be at the place of residence mentioned in the writ. Apart from any question as to boundary, a service out of the county mentioned in the writ, is bad.

Both objections, therefore, must prevail. It is unnecessary for us to consider how the process might properly have been served: it is enough to say that the mode of service here adopted is clearly irregular.

COLTMAN, J. In the case of a writ of summons sued out against an individual, it would not suffice to describe him as “now or late of,” &c. And I see no reason for departing from the proper course in the case of process against an incorporated company.



With regard to the service, the statute expressly requires the service of the writ to be in the county therein mentioned, or within two hundred yards of the border.

Both writ and service, therefore, in this case, are clearly bad, and must be set aside.

MAULE, and V. WILLIAMS, JJ., concurred.

Rule absolute.

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### HINTON v. ACRAMAN.

Nov. 9.

**D**EBT, on a bond given by the defendant and others under the statute 1 & 2 Vict. c. 110. s. 8. The defendant pleaded eight pleas, each of which went to the whole cause of action. (a) Upon the first and third, issues in fact, were joined, and to the rest, the plaintiff demurred. The plaintiff had judgment on the fourth, sixth, seventh, and eighth pleas, and the defendant, on the second and fifth.

The defendant having signed judgment on the second and fifth pleas, and the issues on the first and third remaining undisposed of,

*Manning*, Serjt., in *Trinity* term last, obtained a rule calling upon the defendant to shew cause why he should not enter up judgment of *nil capiat per breve*, or why, in default thereof, the plaintiff should not be at liberty to do so for him. He submitted, that, inasmuch as the defendant had obtained judgment upon pleas which went to the whole cause of action, and therefore the issues in fact had become immaterial, and the judge at *nisi prius* would, as to them, be justified in discharging the jury, the court ought to interpose, to prevent the

The defendant having obtained judgment upon demurrers to two pleas, each going to the whole cause of action, and there remaining issues of fact untried — the court refused to compel the defendant to enter a general judgment of *nil capiat per breve*, in order that the plaintiff might bring a writ of error without going down to trial upon the issues of fact.

(a) *Ante*, Vol. II. p. 367.



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delay and expense of going down to an inquiry that, long as the present judgment stands, must be fruitless.

*Talfourd*, Serjt., and *Jones*, shewed cause. The defendant has already signed judgment on the two issues determined in his favour. The court has no power to compel him to do more. The object of this motion is to enable the plaintiff to sue out a writ of error, which he cannot do in the present imperfect state of the record: *Tolson v. Kaye*. (a) The defendant, notwithstanding the two issues of law found for him, has an undoubted right to insist upon the issues in fact being also disposed of: they cannot be struck out without his consent: *Beckham v. Knight* (b); *Carden v. The General-Cemetery Company* (c); *Tinkler v. Rowland*. (d)

*Manning*, Serjt., in support of his rule. *Beckham v. Knight* and *Carden v. The General-Cemetery Company* proceeded upon the authority of *Metcalf's case* (e), which was before the statute of *Anne*. (g) And even the rule laid down in *Metcalf's case* was subject to several exceptions. The law upon the point is very clearly propounded in a note to *Lawe v. King* (h), where it is said: "Hence it seems to follow, that, where the defendant's plea goes to bar the action, if the plaintiff demurs to it, and the demurrer is determined in favour of the plea, judgment of *nil capiat* shall be entered, notwithstanding there may be also one or more issues in fact; because, upon the whole, it appears that the plaintiff had no cause of action. So, where several pleas are pleaded, since the statute 4 & 5 *Ann. c. 16*, all of them going to destroy the action, and one or more issues are joined on some of the pleas, and there are one

(a) 6 *M. & G.* 536., 7 *Scott*, *N. R.* 222.

(b) 7 *Scott*, 346., 7 *Dowl. P. C.* 409.

(c) 7 *Scott*, 348., 7 *Dowl. P. C.* 425.

(d) 4 *Ad. & E.* 868., 6 *N. & M.* 848.

(e) 11 *Co. Rep.* 38 a.

(g) 4 & 5 *Ann. c. 16*.

(h) 1 *Wms. Sourd.* 80. n. (1)., 6th edit.



or more demurrers to the rest, if the court determine the demurrers in favour of the defendant *before* the issues are tried, they *shall* not be tried; and, if *after* the trial, it will make no difference; for, in each case, judgment of *nil capiat* shall be given against the plaintiff." There are many cases in which the jury have been discharged from finding any verdict upon issues that have become immaterial, in consequence of the decision of one disposing of the whole cause of action. [*Maule, J.* Not since the rule of *H. T. 2 Will. 4. reg. 74.*, giving to each party the costs of such issues as they may respectively have succeeded upon.] Such a construction would give a very mischievous degree of activity to the new rules. [*Maule, J.* In *Fry v. Monckton (a)*, I decided, after argument, that I was bound to try issues joined on several special pleas of justification, although it was admitted by the plaintiff that the defendant was entitled to a verdict on a plea that went to the whole cause of action.] There, the judge was at liberty to try the issues if he pleased; and there was no opportunity to review his decision as to the obligation to try. [*Coltman, J.* Why should we deprive the defendant of his right to try the other two issues?] If a judgment of *nil capiat per breve* is entered, the defendant will not want those issues: the court of error would give the same judgment that this court ought to have given, upon the whole record, and it would award a *venire facias* to try the issues, if, by reason of the reversal of the judgment of *nil capiat* upon the demurrers, those issues became material. In *Tolson v. Kaye*, the court of Exchequer Chamber was of opinion that the judgment of *nil capiat* was not warranted by the state of the record, and was erroneous; and, upon the ground of the judgment of *nil capiat* (which in that case was actually entered) *being erroneous*, they *quashed* the writ of error. Nor would this court be bound by a decision of the Exchequer

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(a) 2 *M. & Rob.* 303.: and see 9 *Dowl. P. C.* 967.



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Chamber, when not acting as a court of error, but, — in giving judgment *quod cassetur breve*, — acting as a court of original jurisdiction. Whichever way the issues on the first and third pleas may be found, the defendant will be entitled to a judgment of *nil capiat per breve*. [Coltman, J. Then you will perhaps consent now that a verdict be entered for the defendant upon those issues.] The plaintiff, of course, will not forego his right to reverse the judgment upon the demurrers, by consenting to an untrue entry. [Coltman, J. How would the judgment now entered in the masters' book be expanded upon the record?] In the form now proposed. The entry is correct as far as it goes, but it is inadequate to the occasion. [Coltman, J. Substantially, you are calling upon us to compel the defendant to do just that which he has already done.] The trial of the issues of fact would be nugatory. [Maule, J. Suppose perjury committed at the trial, do you say it could not be assigned?] If the trial took place, however vexatiously, it might in one event, possibly, not be altogether immaterial.

COLTMAN, J. (a) It may be that the defendant is, in the present state of this record, entitled, if he thinks fit, (b) to enter a judgment of *nil capiat per breve*, as suggested in the note to *Lowe v. King*. However, if that be so, that is a benefit which the law has given him: but I am not prepared to say that he is bound to avail himself of it until the record is complete. Notwithstanding the judgment of this court in his favour, the defendant may think the case not free from difficulty, and may choose to take his chance of establishing a better defence at nisi prius. I think we have no right to deprive him of the opportunity (c) of so doing.

(a) *Wilde*, C. J., having been of counsel in the cause, took no part in the discussion.

(b) The judgment, when entered, would be the act of the

court. In no other state of the record does it appear to be optional with the court to give or withhold its judgment.

(c) *Supra*, 739.



MAULE, J. I am of the same opinion. The defendant in this case, pursuant to the right given to him by the statute of *Anne*, and the decisions of the courts upon its construction, has pleaded eight pleas. Upon two of them, each going to the whole cause of action, he has obtained a decision in his favour upon demurrer: replications have been pleaded to other two, upon which the defendant has joined issue. The proper mode of disposing of those issues is, by a trial by jury. Possibly the defendant may, inasmuch as the pleas disposed of in his favour go to the whole cause of action, be entitled to enter a judgment of *nil capiat per breve* upon the whole record. But he is not bound to do so. If we could see that it could not in any possible event make any difference to the defendant whether the issues in fact were disposed of in the ordinary way or not, we might be induced to interpose our authority to prevent a wasteful expenditure of time and money. But it may be most material to the defendant's interest that the issues of fact should be tried. At all events, we cannot see that it is so clearly immaterial as to justify our striking out (a) those issues without the defendant's consent. I therefore think it consistent with the authorities that have been cited, that this rule should be discharged. The cases upon the subject of discharging the jury from any finding on particular issues, have a considerable bearing upon this point. It is not simply because the plaintiff is willing to allow one plea going to the whole cause of action to be found for the defendant, that he has a right to insist upon having the jury discharged from any finding upon the others. The defendant is entitled to have all the issues disposed of by the verdict of a jury; and it may be material to him that they should be.

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V. WILLIAMS, J., concurred.

(a) See the form of the rule, *suprà*, 787.



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*Manning*, Serjt. urged, that, inasmuch as it was so clearly stated in *Saunders*, that, under such circumstances as these, the issues of fact *could not* be tried, the rule ought not to be discharged with costs.

MAULE, J. The plaintiff is entitled to the fullest credit for the very ingenious experiment he has tried, but not to an exemption from costs. (a)

Rule discharged, with costs.

(a) *Vide Tolson v. Bishop of Carlisle, antè*, Vol. III. p. 53.

Nov. 25.

HAMBIDGE v. DE LA CROUÉE and FRANÇOIS.

One partner has no implied authority to consent to an order for a judgment in an action against himself and his co-partner.

Though the court will, in general, where a defendant is prejudiced by the act of an attorney in acting for him without authority, leave him to his remedy against the attorney, if solvent; that rule does not apply, where

THE defendants carried on business in partnership as merchants, in the city of *London*, until *November*, 1844, when such partnership was dissolved.

On the 6th of *April*, 1846, the plaintiff sued out, and caused the defendant *De la Crouée* to be served with, a writ of summons in an action against the two defendants, for 48*l.* 19*s.* 6*d.*, alleged to be due from them to him for commission. *De la Crouée* immediately called at the office of the plaintiff's attorney, and, without having any authority from *François*, who had not been served with, or had any notice or knowledge that such writ had issued, signed a written consent, on behalf of *François* and himself, to an order for staying the proceedings on payment of the debt and costs by instalments; the attorney who entered the appearance and acted in the matter being introduced to *De la Crouée* for that purpose by the plaintiff's attorney. On the 17th of *September*, *François* was arrested upon a *testatum ca. sa.* at the suit of the plaintiff, for 57*l.* 5*s.* and interest.

the defendant is in custody by reason of the unauthorised act, or where the plaintiff or his attorney is party to the wrong.



Upon affidavits stating the above facts, and also suggesting that the plaintiff and *De la Crouée* were trading together in partnership, and that the proceedings were collusive and designed to defraud *François*, the latter obtained from *Erle, J.*, the following order:—"That the appearance entered for the defendant *François* jointly with *De la Crouée*, at the suit of *Hambidge*, and all subsequent proceedings, be set aside for irregularity, with costs, to be taxed and paid by *Hambidge*; that the defendant *François* be discharged out of the custody of the sheriffs of *London* as to this action, if within four days the sum of 57*l.* 5*s.* be paid into court by the defendant *François*; that the said sum shall be paid to the plaintiff, in case the court shall make a rule absolute for setting aside this order as to the discharge of the defendant *François*, and he shall not be rendered to gaol within four days after such decision; and that, if there be no rule, or the rule be discharged, or the defendant be rendered as above, the said sum be paid out to the defendant *François*, or to his attorney."

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*Ball*, on behalf of the plaintiff, on a former day, obtained a rule nisi to set aside the above order. He submitted, upon the authority of *Brutton v. Burton (a)*, —where it was held that a warrant of attorney under seal, executed by one person for himself and his partner, in the absence of the latter, but with his consent, is a sufficient authority for signing judgment against both, —that *De la Crouée* might lawfully bind his partner by a consent to a judge's order; and, of an *Anonymous* case in *Salkeld (b)*, and *Stanhope v. Firmin (c)*, that the

(a) 1 *Chitt. R.* 707.

(b) 1 *Salk.* 88. And see *P. 8 Edw. 3*, fo. 38, pl. 34.; *Reg. Brev.* 113. a.; *F. N. B.* 96 D.; 1 *T. R.* 62.; *Wightwick*, 122.; *Dec. Abr. Actions on the case (F.2.)*; *Com. Dig. Action on the*

*case for deceit (A. 6.)*; 1 *Fin. Abr.* 576., 4 *N. & M.* 348., 3 *M. & G.* 631.

(c) 3 *N. C.* 301., 4 *Scott*, 39., *S. C.* 5 *Dowl. P. C.* 357., *per nom. Stanhope v. Eavery.*



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remedy of *François*, if any, was against the party who alleged to have improperly assumed to act as his attorney in the matter, in the absence of any evidence that such attorney was insolvent.

*Wise* shewed cause, insisting that the order was well made; for, that one partner had no authority to bind the other, who had not been served with process, by a consent to a judgment against both, after the dissolution of the firm. [*Wilde*, C. J. One partner clearly has no right, without the express consent of his co-partner, to confess a judgment against him.]

*Allen*, Serjt., and *Ball*, who were called on to support the rule, conceding, as a general principle, that one partner could not bind the firm by his unauthorised consent to a judge's order, submitted that *François* should be left to his remedy against the attorney who had acted in the improper manner suggested.

WILDE, C. J. In some cases, no doubt, where a party is aggrieved by one assuming, without authority, to appear and act as his attorney, he is left to pursue his remedy against him. Here, however, the plaintiff is not entirely free from blame; his attorney being the person who introduced *De la Crouée* to the other attorney, for the express purpose of getting his late partner fixed with the supposed debt, by confessing a judgment in the action against both. Besides, the party being in custody, the case differs materially from those in which the courts have thought that complete justice might be done in the way suggested.

COLTMAN, J., concurred.

MAULE, J. One of two partners cannot bind the



other by consenting to a reference: *Stead v. Salt*. (a) He may release debts, because he has authority to receive them. Where the proceedings are, upon the face of them, regular, and the attorney who has acted, has acted without authority, *and is in solvent circumstances*, the courts have said that they would leave the party to his remedy against him. So, here, if, instead of a *ca. sa.*, the execution had been by *fi. fa.*, and the attorney solvent, *François* might have had his remedy against him. But, being in custody under a *ca. sa.*, how is he to be compensated in that way for the loss of his liberty? We should not, in such a case, be doing complete justice, if we abstained from interfering.

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V. WILLIAMS, J., concurred.

Rule discharged, with costs.

(a) 3 Bingham. 101., 10 J. B. dard v. Ingram, 3 Q. B. 839.,  
Moore, 389. And see God- 3 Gale & D. 46.

The QUEEN v. HENRY WILLIAM HEMSWORTH, in  
a Cause of HEMSWORTH v. BRIAN.

Nov. 25.

**BY** a judge's order (afterwards made a rule of court), dated the 23rd of May, 1843, and made in a cause wherein *Henry William Hemsworth* was plaintiff, and *Thomas Henry Brian* defendant, it was ordered that the cause, and all other matters in difference between the  
 A party attached for contempt in not performing an award, and sentenced to imprisonment for a  
 definite period, is not, by undergoing such imprisonment, exonerated from the performance of the award.

And, *semble*, that an action upon the award may be maintained at the same time.

Course of proceeding for enforcing performance of an award by attachment.



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parties, should be referred to an arbitrator, who, by his award, made on the 23rd of *March*, 1844, directed, amongst other things, as follows:—

“ And I further award, order, and direct that the said *H. W. Hemsworth* shall, on the 1st of *April* next, at, &c., pay unto the said *T. H. Brian*, or his attorneys, for the use of the said *T. H. Brian*, the sum of 17*l.* 7*s.* 5*d.*: And I further award, order, and direct that the said *H. W. Hemsworth* shall, on the 30th of *March* instant, deliver up unto the said *T. H. Brian*, his executors, administrators, or assigns, the following warrants of wines and brandy, namely, a warrant for one hogshead of port wine, numbered 2260, now or lately lying in the *East Vault*, *London Docks*, and marked B. No. 2 [here followed a description by marks and numbers of several casks of wine and one hogshead of brandy]: And I further find that the said *H. W. Hemsworth* is in possession of certain wines in bottle, the property of the said *T. H. Brian*, consisting of, &c. &c.: And I further award, order, and direct that the said *H. W. Hemsworth* shall, on the 30th of *March* instant, deliver up all the said wines in bottle to the said *T. H. Brian*, or his servants or agents authorised, by writing under his hand, to receive the same: And I further award, order, and direct, that, if default be made by the said *H. W. Hemsworth*, his executors, administrators, or assigns, in payment of the said sum of 17*l.* 7*s.* 5*d.* to the said *T. H. Brian*, his executors, administrators, or assigns, or to his said attorneys, at the time in that behalf herein by me appointed, or, if the said *H. W. Hemsworth*, his executors, &c., shall not, on the 30th day of *March* instant, deliver up to the said *T. H. Brian*, his executors, &c., the said wine-warrants and brandy-warrant, and the said wines in bottle, hereinbefore directed by me to be delivered up, then and in either of the said cases, after making this my award a rule of Her Majesty's court of



Common Pleas (*a*), the said *T. H. Brian* may immediately proceed by attachment, or otherwise, for the recovery of the said sum of 17*l.* 7*s.* 5*d.*, and of the possession of the said wine-warrants and brandy-warrant and wines in bottle, or either of them, as the case may require."

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In *Hilary* term, 1845, a rule for an attachment against *Hemsworth* was made absolute, for non-payment of the 17*l.* 7*s.* 5*d.*, and non-delivery of the wine and brandy-warrants and wines in bottle, with the exception of the warrant for the hogshead of port-wine, numbered 9260, as to which the demand was insufficient. (*b*) *Hemsworth* was arrested on the 29th of *July*, upon a writ of attachment issued pursuant to this rule.

On the 9th and 12th of *September*, 1845, *Hemsworth* and *J. F. Lackersteen* and *J. B. Huntington*, his bail, entered into recognisances that *Hemsworth* should appear and answer interrogatories, when filed: *Hemsworth* was at the same time sworn before *Platt*, B., at chambers, to answer such interrogatories, when filed.

The interrogatories were filed on the 23rd of *December*, 1845. Notice thereof was given to *Hemsworth* on the 9th of *January*, 1846. On the 15th, he attended before *Coltman*, J., at chambers, for the purpose of being sworn to his answers thereto; but that learned judge declined to swear him, on the ground that he had already been sworn before *Platt*, B. On the 16th, *Hemsworth* went before Master *Ray* to make answer; but, in consequence of the non-attendance of the prosecutor's attorney, and an objection taken by *Hemsworth*, that he ought to have been sworn *in court*, and not before a judge at chambers, nothing was done.

On the 31st,

(*a*) The judge's order, not the award, would be made a rule of court.

(*b*) See *Hemsworth v. Brian*, *ante*, Vol. I. p. 131.



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*Byles*, Serjt., on behalf of *Hemsworth*, obtained a rule calling upon *Brian* to shew cause why the bail should not be discharged and the recognisance cancelled, and why *Hemsworth* should not be discharged from the alleged contempt, and why the interrogatories should not be taken off the file, for irregularity. It was insisted that *Hemsworth* should have been sworn *in court*, and that the interrogatories could not properly be filed until after he had been so sworn.

May 4. *Talfourd*, Serjt., who shewed cause, suggested a doubt whether this was a case in which the party was entitled to have interrogatories filed at all. He referred to *Grady* and *Scotland's Crown-Side Practice* (a), and *Archbold's Practice* (b). [*Erle*, J. The rule nisi, the rule absolute, and the affidavits used in support and in opposition thereto, disclose all the circumstances. I must confess I do not see the use of interrogatories in such a case.]

*Byles*, Serjt., in support of his rule, urged that there had been great and unnecessary delay on the part of the prosecutor: and he referred to *Corner's Crown-Side Practice*. (c)

The court said that the only irregularity had been on the part of *Hemsworth* himself; that he should have come before the court to be sworn in the first instance; and that much of the delay had been the result of the objections urged by himself before the master: and the rule was discharged with costs.

May 22. On the 22nd of *May*, *Hemsworth* appeared in court, and was sworn to answer the interrogatories. By his answers

(a) Page 311. (c) Page 29, 30.  
 (b) 7th edit., by *Chitty*,  
 p. 1271.



thereto (a) filed on the 27th, he admitted that he had been duly called upon to perform the award, and had omitted to do so: but excused himself, as to the non-payment of the money, on the ground of his bankruptcy, and, as to the non-delivery of the wine and brandy-warrants and the wine in bottles, that the former were in the custody of the *Commercial Bank*, who claimed to have a lien upon them, and that the latter was in the possession of his assignees.

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On the 29th of *May*, upon motion, the court ordered that it be referred to Master *Ray*, to examine the matters of the interrogatories and answers, and to report thereon to the court.

*May 29.*  
Reference to  
the master.

On the 6th of *June*, the master made his report, finding, in substance, that *Hemsworth* was in contempt for non-performance of the award, and that his excuses for such non-performance were insufficient.

*June 6.*  
His report.

The court thereupon directed that the matter should stand over until *Monday*, the 8th, when *Hemsworth* was ordered to attend, with his bail; and, on that day, a further order was made by the court, by the consent of the parties, and the bail, — “that the matters of the said prosecution, the recognisances above mentioned, and of the said master’s report, be, and the same are, hereby enlarged to the first day of next term.”

Accordingly, on the first day of this term, the parties again attended, *Hemsworth* appearing in person, and the prosecutor by counsel.

*Nov. 2.*

(a) The interrogatories and answers were respectively in-  
titled in the name of the original cause only.



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Affidavits in  
mitigation.

*Hemsworth's* affidavit filed in mitigation sought to impeach the validity of the award, on the ground of alleged misconduct on the part of the arbitrator; and stated, that a *fiat* in bankruptcy issued against him in *March*, 1844; that the messenger of the court of bankruptcy took possession thereunder of all his property and effects, including all the goods and chattels mentioned in the award, and thereby directed to be given up to *Brian*, with the exception of the wine and brandy-warrants mentioned in the award, which were in the possession of the *Commercial Bank of London* at the time of his bankruptcy, and held by them for money claimed to be due by him to the bank; that the assignees under the *fiat* also claimed the warrants, subject to the lien of the *Commercial Bank*; that the alleged contempt, for and in respect of which he was arrested as aforesaid, was not wilful on his part, but that, for the causes aforesaid, he had been and still was unable to perform or obey the award; that, since the issuing of the attachment against him, he had made repeated offers of compromise, which *Brian* had rejected; that *Brian* having attempted to prove under the *fiat* in respect of his claim under the award, the commissioner declined to receive such proof, but offered to go into the original transactions if *Brian* would forego the award, which *Brian* agreed to do; and that the commissioner thereupon went into the inquiry, and came to the conclusion that the award had been improperly made.

Affidavits in  
aggravation.

The affidavits on the other side stated, that the wines in bottle mentioned in the award, had not taken by the assignees under the *fiat*, they having abstained from taking these wines, by reason of *Hemsworth's* statement that he had no beneficial interest in them, but held them only as trustee for *Brian*, and, consequently, that the same had always remained in the possession and under the control of *Hemsworth*, and that he had since



either sold them or placed them in the hands of his father; that *Hemsworth* had offered to pay *Brian* 200*l.* and his costs, in satisfaction of his demand, or to deposit the whole amount claimed by *Brian*, provided the latter would consent to a second reference; that *Hemsworth's* statement before the commissioner under the *fiat*, shewed that he had considerable property beyond what would satisfy all his creditors; that *Brian's* costs in this matter amounted to nearly 200*l.*; and that an offer had been made by a solicitor, at a meeting of *Hemsworth's* creditors, to advance, upon the security of a certain reversionary interest which he possessed, a sum sufficient to pay all his debts in full, but that *Hemsworth* had not taken any steps to avail himself of that offer, but had been making various attempts to compromise with his creditors upon easier terms.

*Hemsworth*, in person, prayed for time to answer these allegations; but, the court holding that he was not entitled to it, he referred to *Ex parte Laurence (a)*, to shew that the contempt must be wilful, in order to render a party liable to be visited with punishment; and he contended that this being positively and distinctly negatived by his affidavit, he was entitled to be discharged on payment of a nominal fine.

*Talfourd*, Serjt., and *Phipson*, *contra*, insisted that the question, whether the contempt was wilful or not, was concluded by the master's report; and that neither the answers to the interrogatories, nor the statements in *Hemsworth's* affidavit, in any degree purged his contempt; inasmuch as this merely stated circumstances which, if true, only went to the merits of the award, the validity of which it was now too late to impeach.

(a) 2 Dowl. P. C. 230.

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WILDE, C. J. The affidavits clearly shew that the prisoner has no valid excuse for not performing the award. He is, therefore, in contempt. Let him be brought up on *Monday* next; and, in the meantime, we will look further at the affidavits, and consider the proper course to be adopted under the circumstances.

*Cur. adv. vult.*

Nov. 9.

The prisoner being now brought up,

*Talfourd*, Serjt., suggested that the judgment of the court must be specific,—imposing a definite fine or imprisonment, or both.

WILDE, C. J. Having heard and attentively considered all that has been urged on either side, the court is prepared to exert its authority for the enforcing of the prosecutor's rights under the award. The prisoner will, therefore, stand committed until the last day of term, when he will be brought up to receive sentence. In the meantime, the court will require to be furnished with affidavits shewing the value of the wines in question.

The following rule was thereupon drawn up:—

“Upon reading, &c., the said *Henry William Hemsworth* (now present here in court) is, by the court here, adjudged in contempt: it is therefore ordered that the said *Henry William Hemsworth* be committed to the custody of the keeper of the Queen's Prison for the contempt aforesaid; and it is further ordered, that the said keeper, or his deputy, do bring the said *Henry William Hemsworth* to the bar of this court on the 25th day of *November* instant, then and there to receive the judgment of this court for his said contempt.”



Affidavits were accordingly produced on this day. Those filed on the part of the prosecutor stated the value of the wine and brandy-warrants mentioned in the award (exclusive of the warrant for the excepted hogs-head of port-wine), and of the wine in bottles, to be 368*l.* 9*s.* On the part of *Hemsworth*, it was sworn that the utmost value did not exceed 200*l.*

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Affidavits as  
to the value  
of the goods  
ordered to be  
delivered up.

WILDE, C. J. The non-performance of the award is not a single act of contempt which will be purged by a definite period of imprisonment: but the prisoner may, at the expiration of the term for which the court upon this occasion sentences him, if the award shall then remain unperformed, be again brought up to answer for his continuing contempt. Nor will he thereby, as I conceive, be relieved from an action upon the award.

It is evident, from the statements contained in the several affidavits, that the prisoner can, if he pleases, perform this award: and his not doing so is a wilful and pertinacious contempt of the authority of the court. With a view, therefore, to compel him to act justly towards the prosecutor, the sentence of the court is, that he be imprisoned in the Queen's Prison for the space of two years from this date, unless he shall sooner comply with the terms of the award. If he thinks fit for so long a time to withhold the property of the prosecutor, he may consider himself the author of his own imprisonment. This commitment, therefore, will enure until the sum awarded and the costs, are paid, and the warrants and wine are delivered up, or their value paid.

The following rule was thereupon drawn up: —

“Upon reading, &c., the said *Henry William Hemsworth* (now present here in court), being brought to the bar of the court by the keeper of the Queen's Prison, in pursuance of the last-mentioned rule, is by



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the court here adjudged in contempt: It is thereupon ordered that the said *Henry William Hemsworth*, for the contempt aforesaid, be imprisoned in the custody of the keeper of the Queen's Prison for the space of two years from the date hereof; and that the said *Henry William Hemsworth* be remanded to the custody of the said keeper, to be by him kept in safe custody in execution of this judgment."

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ROBINSON v. JAMES BROWN and JANE BROWN,  
 Executor and Executrix of JOHN BROWN,  
 deceased.

Nov. 10.

*B.* and *C.*  
 became  
 jointly and  
 severally  
 bound to *A.*  
 as sureties for  
*D.*, with a  
 condition for  
 the bond  
 to be void, if  
*B.* and *C.*, or  
 either of  
 them, should,  
 within one  
 calendar  
 month next  
 after notice  
 given to them  
 of *D.*'s default,  
 pay any balance  
 that might be  
 due from *D.* to  
*A.*, not exceeding  
 a given sum.  
 In debt by *A.*  
 against the  
 executors of *B.*  
 the issue was,  
 whether or not  
 due notice of  
*D.*'s default  
 had been given  
 to the defendant  
 and to *C.* : —

DEBT, upon a bond, dated the 1st of *April*, 1844,  
 by *George Brown*, *John Brown*, and *Charles  
 Robertson*, to the plaintiff, in the penal sum of 400*l.*  
 The plaintiff, having declared upon the bond without  
 noticing the condition, the defendants, who were sued  
 as executor and executrix of one of the sureties, set it  
 out on oyer, and pleaded performance by the principal.

The condition with its recital was as follows: —

"Whereas the above-bounden *George Brown*, being  
 about to carry on the business of an outfitter, hath ap-  
 plied to, and requested, the above-named *John Robinson*  
 (the plaintiff) to supply him with goods in the way of

of *D.*'s default, pay any balance that might be due from *D.* to *A.*, not exceeding  
 a given sum. In debt by *A.* against the executors of *B.* the issue was,  
 whether or not due notice of *D.*'s default had been given to the defendant  
 and to *C.* : —

Held, that, in order to prove notice to *C.*, it was not enough to produce a du-  
 plicate, with proof that the notice had been sent by post, properly addressed, to  
*C.* ; but that *A.* was bound to produce the original notice, or to account for its  
 absence.



his trade, which he the said *John Robinson* has agreed to do; and, in the course of the dealings between them, the said *George Brown* and *John Robinson*, the said *George Brown* may become indebted unto the said *John Robinson* in divers sums of money, for goods to be sold and delivered, for money to be lent and advanced, or to be paid, laid out, and expended, or upon some other account: and whereas the said *George Brown*, and the said *John Brown* and *Charles Robertson* as his sureties, have agreed to enter into the above-written bond or obligation, subject to such condition as hereinafter is expressed: Now, the condition of the above-written bond or obligation is such, that, if the said *George Brown*, his heirs, executors, or administrators, or some or one of them, do and shall, from time to time and at all times hereafter, well and truly pay, or cause to be paid, unto the said *John Robinson*, his executors, administrators, or assigns, all and every such sum and sums of money as shall, at any time or times hereafter become due and owing to him the said *John Robinson*, either alone or jointly with any other person or persons who shall or may be or become a partner or partners with the said *John Robinson*, his executors, administrators, or assigns, from the said *George Brown*, for goods which shall or may at any time or times hereafter be sold by him or them to the said *George Brown*, and sent and delivered to or to the order of the said *George Brown*, or for money to be at any time or times hereafter lent or advanced, or to be paid, laid out, or expended by the said *John Robinson*, his executors, administrators, or assigns, either alone or jointly with any such partner or partners as aforesaid, or which may upon any other account whatsoever be or become due or owing to the said *John Robinson*, his executors, &c., either alone or jointly

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with any such partner or partners as aforesaid, when and as such sum and sums of money shall respectively become due and payable, not exceeding in the whole the sum of 400*l.*, then the said bond or obligation shall be void and of no effect; or, in case the said *George Brown*, his heirs, executors, or administrators, shall, at any time or times hereafter, make default in payment of any such sum or sums, and the said *John Brown*, and *Charles Robertson*, or one of them, or the heirs, &c., of one of them, shall, within one calendar month next after notice in writing shall have been given to them the said *John Brown* and *Charles Robertson*, their heirs, &c., or shall have been left at their usual or last known place of abode, well and truly pay or cause to be paid unto the said *John Robinson*, his executors, &c., and any future-taken partner or partners of him or them, his, her, or their executors, &c., all and every such sum or sums of money as at the time of such demand being made shall be due and owing from the said *George Brown*, his heirs, &c., unto the said *John Robinson*, his executors, &c., either alone or jointly with the person or persons who shall or may be or become a partner or partners with him or them, in case the same shall not exceed the sum of 200*l.* sterling; but, if the same shall exceed the sum of 200*l.* sterling, then, if the said *John Brown* and *Charles Robertson*, or one of them, their or some or one of their heirs, &c., do and shall, within one calendar month next after such notice shall have been given or left as aforesaid, well and truly pay or cause to be paid unto the said *John Robinson*, his executors, &c., or such person or persons as aforesaid, the said sum of 200*l.*, in part satisfaction of the sum or sums of money which shall be then due and owing as aforesaid, then, and in either of the said cases, the said bond or obligation shall, so far as respects the said *John Brown* and *Charles Robertson*, be void and of no



effect; otherwise the same shall be in full force and virtue."

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The plaintiff in his replication alleged debts to have accrued from *George Brown* to him to the amount of 400*l.*, and exceeding 200*l.*, for goods supplied, which were unpaid; and then averred, that, although afterwards, and after the death of *John Brown*, and more than one calendar month before the commencement of this suit, to wit, on the 26th of *June*, 1845, he, the plaintiff, gave the said *Charles Robertson* and the said defendants, as executor and executrix of the said *John Brown* as aforesaid, respectively, notice in writing to pay, and thereby then required them to pay to him, within one calendar month then next, the sum of 200*l.*, on account, and in part satisfaction, of the said sum of 400*l.* wherein the said *George Brown* then, and at the time of the giving the said notice, was, and is, so indebted to the plaintiff in manner aforesaid; yet neither of them, the said *John Brown* in his lifetime, the defendants as executor and executrix as aforesaid, or the said *Charles Robertson*, had paid the said sum of 200*l.*, or any part thereof, although more than a calendar month from the time of giving of the said notice had elapsed before the commencement of this suit — verification.

Rejoinder, that, after the making of the said writing obligatory, and after the decease of the said *John Brown*, and one calendar month before the commencement of this suit, he the plaintiff did not give to the defendants, executor and executrix as aforesaid, and to the said *Charles Robertson*, respectively, or leave at their respective usual or last known places of abode, notice that the said *George Brown* had made default in payment of the said sum of 200*l.*, or any part thereof — verification.

Surrejoinder, that, after the making of the said writing obligatory, and after the decease of the said *John*



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*Brown*, and one calendar month before the commencement of this suit, to wit, on the 5th day of *July*, 1845, he the plaintiff did give to the defendants, executors and executrix as aforesaid, and to the said *Charles Robertson*, respectively, notice in writing that the said *George Brown* had made default in payment of the said moneys in the said replication mentioned — concluding to the country. Issue thereon.

The cause was tried before *Erle*, J., at the second sitting in *Middlesex*, in *Trinity* term last.

The defendants had admitted that due notice of the default of the principal was delivered to them : and, in order to prove notice to *Robertson*, the plaintiff called a witness, who stated that he had inclosed the notice (a *duplicate* of which he produced) in a letter which he posted, addressed to *Robertson* at his residence near *Cuckfield*, in *Sussex*. There had been no notice to produce, and no *subpœna duces tecum* served on *Robertson*. It was objected, on the part of the defendants, that this was no evidence of the giving of the notice. But the learned judge, conceiving it to be analogous to the case of a notice to quit, or a notice to the drawer of the dishonour of a bill of exchange, received the evidence : and, under his direction, the jury found a verdict for the plaintiff, damages 209*l.* — leave being reserved to the plaintiff to move to increase the damages, if the court should be of opinion that the liability of the sureties on the bond was not limited to 200*l.* ; and to the defendants to move to enter a nonsuit, or a verdict for them, if the court should be of opinion that there was *no* evidence to go to the jury of the notice to *Robertson*.

*Byles*, Serjt., for the defendants, accordingly obtained a rule nisi to enter a nonsuit, or a verdict for the defendants, or for a new trial. He referred to *Lanauze v. Palmer*. (a)

(a) *M. & M.* 31.



*Talfourd*, Serjt., for the plaintiff, obtained a rule nisi to increase the damages to 400*l.* and interest, to which extent he submitted that the sureties were liable, the money not having been paid within the month.

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*Talfourd*, Serjt., *Butt*, and *Hawkins*, now shewed cause against the defendants' rule. The learned judge was quite right in holding, that, for the purpose of proof, the notice in question was analogous to a notice of dishonour, or notice to quit, and the like. Whether or not a notice of dishonour could be so proved, was formerly the subject of much doubt: but that doubt was removed by the case of *Kine v. Beaumont*, (*a*) where all the previous authorities were considered, and where the copy of a letter containing the notice was held admissible, without any notice to the defendant to produce the original. *Kine v. Beaumont* was recognized as an authority, in the subsequent case of *Swain v. Lewis* (*b*). [*Maule*, J. There can be no hardship on the defendant, where there is a distinct issue upon the notice: he must know it will be produced in evidence. Is there any case of a notice of dishonour given to a third person being sought to be proved in this way?] *Lanauze v. Palmer* was a case of that sort: it was an action by an indorsee against an indorser of certain bills of exchange; the notice, therefore, was foreign to the issue. It is entirely different from the present case: and, besides, it was merely a decision at nisi prius, which (the verdict being for the plaintiff, who tendered the evidence) there was no opportunity of reviewing. Here, the notice was the very matter in issue between the parties: and, where that is the case, there can be no distinction, in regard to proof, between a notice to the defendant and a notice to a third person.

(*a*) 3 *B. & B.* 288., 7 *J. B.*      (*b*) 2 *C. M. & R.* 261.  
*Moore*, 112.



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There is no authority whatever for saying that it is only in the case of a notice to the defendant himself that the ordinary notice to produce is dispensed with. In ejectment, where the defendant defends as landlord, and it is necessary to shew a notice to quit served on the tenant, it is enough to give notice to produce it, in order to let in secondary evidence, though the tenant is no party to the record. [*Coltman, J.* Is not the principle this, that secondary evidence is admissible, because the defendant has had notice to produce the original, and the plaintiff has no means of getting at it?] In truth, this is not secondary evidence: it was a notice to the defendants as well as to *Robertson*. And it may be doubted whether, in order to charge the defendants, it was necessary to give any notice to the other surety.

*Byles, Serjt., and Worledge*, in support of the rule. Whether notice to *Robertson* was necessary or not, is not now the question: that point could only arise upon a motion for judgment *non obstante veredicto*. The condition of the bond expressly requires notice of the default of the principal to be given to both sureties. The plaintiff was bound to prove the issue taken by him, viz. that notice was given as well to *Robertson* as to the defendants. In order to do this, he should have subpœnaed *Robertson*. This is not like the case of a notice to the defendants themselves: they have no knowledge of, or controul over, notices delivered to a third person who is no party to the record, and between whom and themselves there is no privity. In the case of *The Queen v. Fenton (a)*, which was an indictment for larceny, in stealing a coat contained in a paper parcel, *Parke, B.*, held that the prosecutor was not entitled to

(a) *Bury Summer Assizes, 1846.* Not reported.



give evidence as to the direction on the parcel, without first shewing that he had given notice to produce it. A witness may on the *voir dire* say that a release has been executed, but it cannot be proved in that manner. Here, the contents of the letter were just as inadmissible as the cover of it. This is not a mere notice: it is a demand of payment. *Grove v. Ware* (a) is as nearly as possible parallel with the present case. There the defendant entered into a bond, as surety, for payment of any sum that might be due to the plaintiff from one *Spriggins*, within six months after notice: and Lord *Ellenborough* held that it was necessary to prove a notice to produce the notice of the principal's default.

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**WILDE, C. J.** The parties went down to contest the issue in the terms in which it is taken, namely, whether or not the plaintiff gave to the defendants, and to *Robertson*, respectively, a month before the commencement of the action, notice in writing that *George Brown*, the principal debtor, had made default: and the question raised at the trial, was, whether the relative position of the parties was such as to dispense with the necessity of producing the notice served on *Robertson*. The ground upon which the plaintiff relied for this purpose, was, the supposed analogy of this case to that of a notice of dishonour, and that large class of cases in which secondary evidence of the document is allowed to be given without a notice to produce the original. The case under consideration, however, does not seem to me to be at all analogous to those: they are all cases where the party has possession of the paper, and can produce it, or where the parties stood in such a relation as to make a delivery to the one equivalent to a delivery to the other. But this is the case of two sureties, who are

(a) 2 Stark. N. P. C. 174.



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not so connected as to make the delivery to one of notice of their principal's default equivalent to the delivery of a notice to both. The plaintiff, therefore, has failed, not for a want of a notice to produce, — which in my judgment would not alter the case, — but because he has not proved the issue. The paper should have been produced, or its non-production so accounted for as to render secondary evidence of its contents admissible. No evidence of that sort having been given, I am of opinion that the rule must be made absolute for entering a nonsuit.

COLTMAN J. I am at a loss to see how the defendants could be benefited by a notice to *Robertson*: but, in order to sustain the issue, I think the plaintiff was bound to produce the original notice, or excuse its absence in the usual way.

MAULE J. The issue in this case was, whether or not notice of *George Brown's* default had been given to the defendants and to *Robertson*, the co-surety of the defendant's testator. *Robertson* is a stranger to the action, and is in no sort of privity with the defendants: in fact, their interests are antagonistic: they are in no degree identified. The question, then, is, whether notice had been given to *Robertson*, a stranger to the action. The proper mode of proving the delivery of any document, is, subject to certain exceptions, of which this is not one, by producing the document itself. A notice of dishonour, which is one of the exceptions, goes on the ground that it is not necessary to give any other notice to the defendant than that which is given by the proceedings, the defendant being sufficiently warned by the issue that the plaintiff means to give secondary evidence of the contents of the notice, unless the defendant produces it himself. If, however, the document is not in



the possession or under the controul of the defendant, the analogy does not arise. It may be that the defendants here had not the means of producing this notice. They may know that the document is of a different import from that alleged by the plaintiff; but they know that the plaintiff, having distinct notice that they deny its existence, must give some evidence of its contents. In the absence, therefore, of any evidence to excuse its non-production, I think the plaintiff was bound to produce the notice itself; and, as he failed to do so, the rule for entering a nonsuit must be made absolute.

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V. WILLIAMS, J., concurred.

Rule absolute to enter a nonsuit. (a)

(a) The rule to increase the damages was, of course, discharged.

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LOMAX v. WILSON.

Nov. 23.

**A**SSUMPSIT, by indorsee against drawer of a bill of exchange.

The first count of the declaration stated that the defendant, on the 21st of *May*, 1846, made his bill of exchange in writing, and directed the same to one defendant, and in the second for money alleged to be due from the defendant upon an account stated — concluding, that, “in consideration of the premises respectively, the defendant promised to pay *the said several last-mentioned moneys* respectively to the plaintiff, on request.”

The defendant demurred to the second count, on the ground that it contained an incorrect statement of the consideration for the promise; or, if “the last-mentioned moneys” included the money in the first count, then the second count was bad for duplicity.

The court set aside the demurrer as frivolous.



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*William Watkins*, and thereby required the said *William Watkins* to pay to the order of the defendant 18*l.* 1*s.* 6*d.* six months after the date thereof, which period had elapsed before the commencement of this suit; and the said defendant then indorsed the same to the plaintiff, and the said *William Watkins* did not pay the said bill, although the same was presented to him on the day when it became due; of all which the defendant had due notice: and the defendant then, in consideration of the premises, promised the plaintiff to pay him the amount of the said bill when he the defendant should be thereunto afterwards requested.

The second count stated, that, whereas also the defendant, on the 18th of *September*, 1846, was indebted to the plaintiff in 20*l.* for money found to be due from the defendant to the plaintiff on an account then stated between them; and whereas the defendant afterwards, on the day and year last aforesaid, in consideration of the premises respectively, then promised to pay *the said several last-mentioned moneys* respectively to the plaintiff on request; yet he hath disregarded his promises, and hath not paid any of the said moneys, or any part thereof, to the plaintiff's damage of 40*l.*, and thereupon he brings suit, &c.

The defendant pleaded to the first count, that he had not due notice of the non-payment of the bill by *Watkins*; and to the second he demurred specially assigning for causes — that the promise alleged in the said last count is a promise to pay “the said several last-mentioned moneys respectively,” whereas there is only *one sum* of money in the declaration to which the promise in the last count mentioned can apply, which is insensible, and repugnant — and also that it is alleged in the said last count that the defendant promised therein mentioned, “in consideration of the premises respectively,” which allegation necessarily includes within such consideration the premises mentioned in



the first count of the declaration, as well as those mentioned in the last; and that this statement of the consideration in the said last count is insensible and repugnant, as the premises mentioned in the first count of the declaration cannot properly form a consideration for the promise mentioned in the last count of the declaration—and also that, if it is meant by the allegation of “the several last-mentioned moneys,” in the said last count, to include therein the moneys in the first count mentioned, then the said last count is double, for containing a second promise, and one alleged to have been made on a different day from the day in the first count mentioned, to pay the moneys in the first count mentioned—and also that the said last count is uncertain, in this respect, that it is doubtful whether the promise and consideration therein mentioned are intended to refer to the sum of 20*l.* therein mentioned only, or whether they are also intended to refer to and include the money and consideration mentioned in the first count—and also that the said last count is in other respects uncertain, informal, and insufficient.

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*Willes*, on a former day in this term, obtained a rule nisi to set aside this demurrer as frivolous.

*Fortescue* shewed cause. The second count is clearly bad, for containing an incorrect statement of the consideration for the defendant's promise; or, if the “last-mentioned moneys” included the money in the first count, then the second count is bad for duplicity. The courts have frequently said that they would require the new rules to be strictly adhered to, otherwise there would in every case be an argument as to the propriety of equivalent expressions.

*Willes*, in support of his rule. There is no double promise to pay the money mentioned in the second



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count. If there be any objection on the score of duplicity, that applies to the first count, which is not demurred to.

WILDE C. J. This objection is so obviously taken for the mere purpose of delaying the plaintiff, and is so refined, that I am not sorry that it should fail. Suppose the defendant did, in consideration of the debt due upon the bill, and of the money found due upon the account stated, promise to pay, the second count would not be bad because it affected to add to a good consideration something that was redundant and unnecessary, and that might be rejected as surplusage. If there be any objection on the score of *bis petitum*, that may apply to the first count, but clearly not to the second. I think the rule for setting aside the demurrer must be made absolute.

The rest of the court concurring,

Rule absolute.

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### VAUGHAN v. HANCOCK.

Nov. 5.

The plaintiff agreed to let a house to the defendant, and to sell him certain furniture and fixtures therein, and to make certain alterations

and improvements in the house; and the defendant agreed to take the house, and to pay for the furniture and fixtures and alterations: — Held, that this was an agreement relating to an interest in land, within the fourth section of the statute of frauds.

**A**SSUMPSIT. The declaration stated, that, in consideration that the plaintiff would let to the defendant, as yearly tenant, a certain messuage, &c., and would sell to the plaintiff, for a certain sum of money, certain furniture and fixtures then being in and upon the said messuage, and would make certain improvements and alterations therein, according to the desire and to



ation of the defendant, he the defendant then that he would become the tenant of the and would take the said furniture at a reasonable and would pay to the plaintiff a reasonable he said alterations and improvements: Aver- the plaintiff was ready and willing to let the and then tendered the same to the defendant, then ready and willing to sell the said furni- fixtures to the defendant, and did then make alterations and improvements in the said mes- , the same amounting to the sum of 12*l.* 10*s.*; the defendant would not then become the ., nor take the said furniture and fixtures, or onable price for the same, nor would he pay am of 12*l.* 10*s.*, or any part thereof, for the ations and improvements.

on assumpsit. (a)

use came on for trial before *Erle*, J., at the assizes. The plaintiff sought to prove the alleged in the declaration by oral testimony: objected on the part of the defendant, that, ontract relating to lands, it could only be sus- written proof; and the cases of *The Earl* *uth v. Thomas* (b) and *Mechelen v. Wallace* (c) l.

urned judge nonsuited the plaintiff, giving him move to enter a verdict for 12*l.* 13*s.* 4*d.*, if the uld be of opinion that the case was not within section of the statute of frauds.

r now moved accordingly. The cases cited at lo not govern this. In *Mechelen v. Wallace*,— ch the learned judge's decision proceeded, —

e 1 *M. & G.* 773., (b) 1 *C. & M.* 89.  
 8 *M. & G.* 462. (a), (c) 7 *Ad. & E.* 49., 2 *N. &*  
 393. (a), 6 *M. & G.* P. 224.  
*C. B.* 268.

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the declaration stated that the plaintiff was desirous of taking a furnished house as a school; that the defendant was possessed of a house in part furnished, and all other furniture necessary for completely furnishing the same; that thereupon, in consideration that the plaintiff would take possession of the house so partly furnished, and would, if the furniture necessary for the completely furnishing the house for the purpose aforesaid should be sent into the house by the defendant within a reasonable time, become the tenant of the defendant of the house, with all the furniture aforesaid, at the rent aforesaid, and pay the rent quarterly, commencing, &c., the defendant promised the plaintiff that he the defendant would, within a reasonable time after the plaintiff should have so taken possession of the same house and premises, send into the said house and premises all the furniture necessary for the completing of the furnishing of the said house with furniture of good quality; and then averred that the defendant took possession of the house; and alleged for breaches, that the articles of furniture sent into the said house were not of good quality, and that all the furniture necessary for the completing of the furnishing of the said house, was not sent in. The defendant pleaded (a) that there was no note, or memorandum in writing, of the promise stated in the declaration. And it was held, on demurrer, that the promise stated in the declaration related to land, and that, as there was no note or memorandum in writing, no action could be maintained upon it. There, as in *The Earl of Falmouth v. Thomas*, the contract was entire; and, as Lord Denman observed, "the bare statement of the case shewed that the contract related to an interest in land." Here, however, the contract is divisible, and, on the pleadings, it is divided. There would be a perfectly good consider-

(a) Vide *suprà*, 767. (a).



eft, if all were expunged except that part which  
 l to the alterations and improvements. [*Maule, J.*  
 tting of the house was clearly the material part  
 consideration for the contract.] No doubt the  
 of the house was part of the inducement to the  
 ant's entering into the contract: but the ques-  
 , whether the three branches of the contract may  
 severed.

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LDE, C. J. I cannot see the smallest ground for  
 ng that the plaintiff was properly nonsuited in  
 se. The principal subject-matter of the agree-  
 was the occupation of the premises. It was with  
 only to that, that the defendant contracted to  
 r the improvements and alterations, which were  
 sly desirable to him only in connection with his  
 tion of the house. The consideration was  
 for the letting of the house with the alterations.  
*len v. Wallace* is a distinct authority.

: rest of the court concurring —

Rule refused.

END OF MICHAELMAS TERM.



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CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF COMMON PLEAS,  
AND  
UPON WRITS OF ERROR FROM THAT COURT  
TO THE  
EXCHEQUER CHAMBER,  
IN  
Hilary Term,  
IN THE TENTH YEAR OF THE REIGN OF VICTORIA.

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The judges who usually sat in banco in this term, were,

WILDE, C. J.

CRESSWELL, J.

MAULE, J.

V. WILLIAMS, J.

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DOE dem. HOPE and Another v. ROE.

Jan. 12.

Service of a declaration and notice upon the tenant, by shewing him the same, *off the premises*, and attempting to serve him with a copy, and to explain the same to him, and subsequently leaving a copy with a servant of the tenant on the premises, and explaining it to him :— Held, sufficient.

CHANNELL, Serjt., moved for judgment against the casual ejector, upon an affidavit of a clerk of the plaintiff's attorney, stating that, on the 8th instant, the tenant in possession called at the office of the attorneys, when the deponent produced a copy of the declaration, and explained the nature thereof to him, and was proceeding to read to him the notice at the foot thereof, when the tenant interrupted him, and attempted to go away, telling the deponent he should not take any



e kind, but would see one of the firm on g day; that the deponent thereupon urged to stay while he finished reading the notice, him the declaration, but he refused to take ired hastily from the office, the deponent m and repeating his offers to serve him with ion; and that the deponent on the following ended at the premises, and there left a copy laration and notice with a servant of the tenant being absent), to whom he read over and explained the intent and meaning of the tion and notice, and such service thereof on hat the servant said he would give the paper er immediately on his return home. The eant referred to *Doe d. Roberts v. Roe(a)*, ce of a declaration and notice, by showing e tenant *on the premises*, and reading over ning their nature and object to his clerk enant going away, and refusing to listen, — good service. [*Wilde, C. J.* That was a *the premises*: has it ever been held that a like this, *off the premises*, is equivalent to It has not. (b) It is submitted, however, the whole circumstances together, there has ect service.

am. Under the circumstances, we think hich has been done is tantamount to a per- e upon the tenant on the premises.

Rule absolute. (c)

t, *N. R.* 833.  
principal case, as  
e case cited, the  
as it was allowed  
to proceed, and as  
available for any  
*personal* service,  
effected anywhere.  
e d. *Shepherd v.*  
J., *Q. B.* 129,

service on a servant of the  
tenant in possession, *upon the*  
*premises*, with a subsequent con-  
versation between the attorney  
of the lessor of the plaintiff and  
the tenant, *not upon the pre-*  
*mises*, in which the attorney  
explained the nature of the de-  
claration and of the service, was  
held insufficient.

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Doe dem.  
HOPE  
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ROE.



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## NELSON and Another v. PATTRICK.

Jan. 12.

*A.* contracted to buy of *B.* certain cement, in casks and bags, at a given price, for *cash*; *B.* agreeing to allow *A.* 3*s.* 6*d.* for each cask, and 2*s.* 6*d.* for each bag, that should be returned perfect.

In an action by *A.* against *B.* for not accepting and paying for the casks and bags, the declaration averred that *A.* duly paid *B.* for the said cement, and for the casks and bags; and that, although *A.*

was ready and willing, and tendered and offered, to return the casks and bags, *B.* refused to accept or pay for them.

*B.* pleaded that *A.* did not duly pay *B.* for the said cement, casks, and bags; and that *A.* was not ready and willing to return the casks and bags to *B.* within a reasonable time: —

Held, that a payment of the price of the cement by *A.* after an action brought against him, was a payment according to the contract, so as to entitle him to complain of a breach of the contract on the part of *B.*

Held, also, that *A.* was not bound to prove that he was ready to return *all* the casks and bags — the allegation being in this respect divisible.

**A**SSUMPSIT, on a special agreement for the purchase of cement, partly in casks, and partly in bags.

The declaration stated, that, on the 1st of *February*, 1846, the defendant sold and delivered to the plaintiffs, and the plaintiffs purchased and received of and from the defendant, divers quantities of cement, amounting to a large quantity, to wit, 5000 bushels, upon the terms and conditions following, that is to say, that the plaintiffs should pay for the same at and after the rate or price of 10*d.* per bushel for so much of the said cement as was delivered in casks, and 9½*d.* per bushel for so much as was delivered in sacks or bags; 4*s.* 6*d.* to be paid by the plaintiffs for each cask, and 3*s.* 2*d.* for each sack or bag; and that the defendant should allow to the plaintiffs 3*s.* 6*d.* for each cask, and 3*s.* 2*d.* for each bag, which should be returned, if perfect casks, with top and bottom: *terms, cash*: Averment, that a large quantity, to wit, 3000 bushels, of the said cement was delivered to the plaintiffs in divers, to wit, 620 casks, and that the residue of the said cement was delivered to the plaintiffs in divers, to wit, 620 bags; that,



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afterwards, to wit, on the day and year last aforesaid, they, the plaintiffs, duly paid the defendant for the said cement, and for the said casks and bags, after the rate and according to the terms aforesaid, and without making any deduction or allowance for or on account of the said casks and bags in which the said cement was so delivered as aforesaid; and that, although the plaintiffs, afterwards, to wit, on the 25th of *April*, 1846, were ready and willing, and then tendered and offered, to return to the defendant the said bags perfect, and the said casks perfect, with tops and bottoms, and then requested the defendant to accept the same, and to allow and pay them for the same as aforesaid; yet the defendant did not nor would, at the said time when he was so requested as aforesaid, or at any time before or since, accept the said casks and bags, or either of them, or any part thereof, of or from the plaintiffs, or pay them for the same as aforesaid, but then wholly neglected and refused so to do, &c.

The defendant pleaded — first, that the defendant did not sell or deliver to the plaintiffs the said cement, upon the terms and conditions in that behalf alleged — secondly, that the plaintiffs did not duly pay the defendant for the said cement, casks, and bags, after the rate and according to the terms in the declaration in that behalf alleged — thirdly, that the plaintiffs were not ready and willing to return the said bags and casks, with the said tops and bottoms, to the defendant within a reasonable time of the delivery to, and receipt by, the said plaintiffs, of the said cement, bags, and casks, as in the declaration mentioned.

The cause was tried before *Wilde*, C. J., at the sittings in *London* after last *Michaelmas* term. The contract, as alleged in the declaration, was proved. It appeared that two parcels of cement had been delivered by the defendant to the plaintiffs; the first, upon



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the 23rd of *January*, 1846, which was paid for by cheque on the 30th; the second, on the 11th of *February*, which, in consequence of a dispute as to the quality of the article, was not paid for until the 17th of *April*, an action having in the meantime been brought for it. On the 18th, the plaintiffs wrote to inform the defendant that the casks and bags were ready to be returned to him; but the latter refused to accept them. It was proved that a certain number of the casks (not quite the whole) were piled up on the plaintiffs' premises ready for delivery, the heads being inside.

On the part of the defendant, it was insisted, that, by the terms of the contract, the payment for the goods in cash, on delivery, was a condition precedent to the plaintiffs' right to complain of a breach of the contract on the defendant's part; and that the plaintiffs were bound to prove that *all* the casks and bags were ready for delivery.

His lordship was of opinion that the words "terms, cash," in the contract, did not amount to a condition precedent, but merely operated as an exclusion of credit: and he left it to the jury to say whether the plaintiffs had offered to return the casks and bags within a reasonable time.

The jury found a verdict for the plaintiffs, damages 191*l.*; and leave was reserved to the defendant to move to enter a verdict for him on the second and third issues, or a nonsuit, if the court should be of opinion that the objections taken at the trial were well founded.

*Byles*, Serjt. (with whom was *Warren*), now moved accordingly. The words "terms, cash," in this contract clearly constitute a condition precedent to the obligation of the defendant to be satisfied with the stipulated price. Where a sale is made for cash, and the purchaser chooses to take a long credit, he surely can



have no right to insist upon paying cash prices: the vendor is entitled to a credit price. [*Maule, J.* If the seller parts with the goods without receiving ready money, all he gets in exchange is an immediate right of action for the breach of contract.] He would not be bound to sue upon the special contract.

As to the third issue, the declaration alleges that the plaintiffs were ready and willing, and tendered and offered, to return to the defendant "the said bags perfect, and the said casks perfect, with tops and bottoms." Upon a traverse of this allegation, the plaintiffs were bound to prove that *all* the bags and casks were ready for delivery. [*Maule, J.* Is not the allegation divisible?] The allegation should have been, that the plaintiffs were ready and willing to return divers, to wit, so many of the said casks and bags.

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**WILDE, C. J.** There is no dispute about the facts, and no difficulty as to the law, of this case. The action arises out of a contract for the sale, by the defendant to the plaintiffs, of certain bags and casks of cement. The sale was for cash. The meaning of that is, that the seller shall have a present right to the money, or to an action against the purchaser if the money be not presently paid. Here, the payment was clearly a payment according to the contract. The second issue, therefore, was properly found for the plaintiffs. As to the return of the casks and bags, the defendant had notice that they were ready; and there was substantially evidence that they were so—a certain number of the casks being piled up on the plaintiffs' premises. And there was no evidence on the other side to countervail that. But, suppose the plaintiffs were not ready to return the *whole*, under this allegation it was perfectly competent to them to prove that they were ready to return a portion of them: and this would be no variance.



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MAULE, J. The allegation that the plaintiffs were ready and willing, and tendered and offered, to return the casks and bags, needed not to be proved in its entirety, not being of a class in which number is material. The plaintiffs clearly sustained the issue by proving their readiness to return any portion of them.

CRESSWELL, J., and V. WILLIAMS, J., concurred.

Rule refused.

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LANE v. DIXON.

Jan. 13.

A. hired of B. certain rooms in the house of B., at a yearly rent, with the privilege of putting a brass-plate, with A.'s name engraved thereon, upon the front-door, there to remain so long as A. should continue to

occupy the apartments. The rent being in arrear, B. removed the brass-plate from the door, and refused to allow the plaintiff to have access to the apartments.

In trespass, charging that B. broke and entered the apartments of A., and expelled him therefrom, and removed the plate, and seized and converted his goods. B., amongst other pleas, pleaded that A. was not possessed of the brass-plate:—

Held, that the facts warranted the jury in finding that B. was guilty of *breaking and entering* the apartments; that the removal of the plate was properly treated as a substantive trespass, having been pleaded to as such; and that, in the absence of evidence to shew that it was affixed to the freehold, it must be assumed to be a chattel only.



aforesaid, to wit, on the day and year first aforesaid, removed and took a certain brass-plate of the plaintiff, containing engraved thereon the name of the plaintiff, off and from the outer door of the said dwelling-house, and kept and continued the said brass-plate so removed and taken as aforesaid, for a long space of time, to wit, from thence hitherto; and also, during the time aforesaid, to wit, during the time first aforesaid, seized and took certain furniture, papers, goods, and chattels, to wit, &c. &c., of great value, to wit, of the value of 1000*l.*, and kept and detained the same from the plaintiff for a long space of time, to wit, to the commencement of the action, and converted and disposed thereof to his own use: By means of which several premises, not only the plaintiff, for and during all that time, lost and was deprived of the use and benefit of his said rooms and apartments, but also he the plaintiff was, during all that time, hindered and prevented from carrying on and transacting therein his lawful and necessary affairs and business, and had been forced and obliged to lay out and expend, and had laid out and expended, a large sum of money, to wit, the sum of 50*l.*, in and about the procuring and providing himself with other rooms and apartments, and other furniture, papers, goods, and chattels, in the room and place of the same so taken, detained, and converted as aforesaid; and also he the plaintiff was thereby greatly exposed and injured in his credit and circumstances; and other wrongs, &c.

The defendant pleaded — first, not guilty.

Secondly, as to the breaking and entering the said rooms and apartments in the declaration mentioned, that the said rooms and apartments were not, nor were nor was any or either of them, at the said times when &c., or at any or either of them, the rooms or apartments, or room or apartment of the plaintiff, *modo et forma* — concluding to the country.

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Thirdly — as to the same trespass — that one *Johnson*, before any of the said times when &c., to wit, on the 26th of *September*, 1845, was seised in his demesne as of fee of and in the said rooms and apartments in which &c., and of and in the remainder of the said house in the declaration mentioned, with the appurtenances, and, being so thereof seised, afterwards and before any of the said times when &c. in the declaration mentioned, to wit, on the day and year last aforesaid, by a certain indenture then made between *Johnson* of the one part, and the defendant of the other part — profert — *Johnson* demised the said rooms and apartments in which &c., together with the remainder of the said house, to the defendant, to have and to hold the same to the defendant from the 29th of *September*, 1845, for and during and unto the full end and term of twenty-one years from thence next ensuing, determinable, nevertheless, as in the indenture mentioned *prout patet*, &c.; that by virtue of that demise, the defendant afterwards and before any of the said times when, &c., and after the said 29th of *September*, 1845, to wit, on the 30th of *September*, 1845, entered in and upon the said rooms and apartments in which &c., and the remainder of the said house, and became and was possessed thereof for the said term so to him thereof granted as aforesaid; \* that, the defendant being so possessed, the plaintiff, claiming title to the said rooms and apartments in which &c., with the appurtenances, under colour of a certain charter of demise pretended (a) to be thereof made to him by *Johnson*, for the term of his natural life, before the making of the said demise by *Johnson* to the defendant as aforesaid, whereas nothing of or in the said rooms and apartments in which &c., or any part thereof, ever passed by virtue of that charter, afterwards, and before each

(a) Vide *antè*.



at said times when &c., and during the continuance of the said term so demised to the defendant as aforesaid, to wit, on the several days in the declaration mentioned, entered into and upon the said rooms and apartments which &c., with the appurtenances, and was thereof assessed at each of the said times when &c.; that thereupon, the defendant, at each of the said several times when &c., entered into and upon the said rooms and apartments in the declaration mentioned, and in which &c., in and upon the plaintiff's possession thereof, being the rooms and apartments of the defendant, doing no unnecessary damage to the plaintiff on the occasion aforesaid; which were the same alleged trespasses in the introductory part of the plea mentioned, and whereof the plaintiff had above thereof complained against him — verification.

Fourthly — as to the removing and taking the said brass-plate off and from the outer door — that the plaintiff is not possessed of the said brass-plate, *modo et formâ* concluding to the country.

Fifthly — as to the same trespass — that the defendant, at the time of the affixing of the said brass-plate to the said outer door, as thereafter mentioned, and from thence until and at the time when the same was so moved and taken off and from the said outer door, was assessed of the said outer door; that, before the same was so removed and taken, as in the declaration mentioned, to wit, on the 1st of *January*, 1846, he, the plaintiff, by the permission of the defendant, affixed the said brass-plate to the said outer door, upon certain terms set before the time of the so affixing the same, to wit, that &c. last aforesaid, agreed to by the plaintiff and defendant, that is to say, on the terms that the defendant might remove and take the said brass-plate off and from the said outer door whenever he the defendant should so please; that the said brass-plate continued so fixed to the said outer door, upon the terms aforesaid,

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until and at the said time when &c., as in the declaration mentioned, the defendant removed and took the same off and from the said outer door; that, at the said time when &c., as in the declaration mentioned, the said terms then still remaining in full force, he the defendant removed and took the said brass-plate off and from the said outer door, because he the defendant then, at the said time, pleased so to remove the same off and from the said outer door, as he lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff on the occasion aforesaid; which was the same trespass, &c. — verification.

The sixth plea — as to the breaking and entering the said rooms and apartments at the first of the said times when &c. in the declaration mentioned, and as to the seizing and taking the said furniture, papers, goods, and chattels in the declaration mentioned — after stating the demise by *Johnson* to the defendant, and the entry of the latter thereunder, as in the third plea, down to the asterisk — proceeded to aver, that, being so possessed, the defendant, at the commencement of the said term so to him therein granted as in that plea mentioned, and before the first of the said times when &c., to wit, on the 30th *September*, 1845, demised to the plaintiff the said rooms and apartments in which &c., to have and to hold the same thenceforth to the plaintiff at the will of the defendant, at and under the weekly rent of 19s. 3d., payable weekly, that is to say, on every *Monday* in every week while the said tenancy should so continue; that, by virtue of the last-mentioned demise, the plaintiff, at the time of the making thereof, and before the first of the said times when &c., to wit, on &c. last aforesaid, entered into and upon the said rooms and apartments in which &c., and became and was possessed thereof for the said estate to him thereof granted as aforesaid, the reversion thereof belonging to the defendant for all the residue of the term so to him granted



by *Johnson*; that the plaintiff so then continued to be such tenant to the defendant as last aforesaid, for a long time, to wit, from the making of the said demise to the plaintiff until and at the first of the said times when &c. in the declaration mentioned; that afterwards, during the said tenancy of the plaintiff, and while the reversion belonged to the defendant as aforesaid, to wit, on the 12th of *January*, 1846, and before the first of the said times when &c., a large sum of money, to wit, 14*l.* 18*s.* 9*d.*, of the rent aforesaid, for fifteen weeks of the said tenancy of the plaintiff, ending on the day and year last aforesaid, and then last elapsed, became and was due and payable to the defendant, and at the said first of the said times when &c. was in arrear and unpaid; wherefore the defendant, during the continuance of the said term so to him granted as aforesaid, and of the said estate of the plaintiff, and while the reversion so belonged to the defendant, at the first of the said times when &c., the outer door of the said rooms and apartments then being open, did, in the daytime, enter into and upon the said rooms and apartments in which &c., for the purpose and in order to seize, and did then seize, take, and distrain the said furniture, papers, goods, and chattels in the declaration mentioned, as and for a distress for the said rent so due and in arrear as aforesaid, and which were then liable to be distrained as and for such distress, and which at the time of the said distress were in and upon the said rooms and apartments, and carried away and impounded the same as such distress as aforesaid, as he the defendant lawfully might for the cause aforesaid, doing no unnecessary damage to the plaintiff on the occasion aforesaid; which were the same alleged trespasses in the introductory part of the plea, &c. — verification.

The plaintiff joined issue on the first, second, fourth, and fifth pleas. To the third plea he replied that *Johnson*, before any of the said times when &c. in the

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declaration mentioned, and before the indenture in the third plea mentioned, to wit, on the 30th of *August*, 1845, demised the said rooms and apartments to the plaintiff, to have and to hold the same to the plaintiff, &c., from thence unto and until the 29th of *September*, 1845, aforesaid, and thence from year to year; that, by virtue of that demise, the plaintiff entered and continued possessed of the said rooms and apartments, until the defendant, at the said times when &c., of his own wrong, broke and entered the said rooms and apartments in which &c. in the said third plea and in the declaration mentioned; and that the defendant unlawfully became possessed thereof, and unlawfully committed the trespasses in the introductory part of the said third plea mentioned, in manner and form as the plaintiff had above thereof complained against him — verification. And he traversed the demise alleged in the sixth plea.

The cause was tried before *Erle*, J., at the last sitting at *Westminster*, in *Trinity* term last. The facts were as follow: — In *August*, 1845, the plaintiff, a medical practitioner, hired from one *Johnson* certain rooms in *Bury Street*, *St. James's*, at a rent of 50*L.* a year, with the privilege of putting a brass-plate with his name engraved thereon, upon the front door, there to remain so long as he should continue to occupy the apartments. In *September*, *Johnson* demised the whole house to the defendant, for twenty-one years. On the 15th of *January*, 1846, the rent being unpaid, the defendant removed the plaintiff's brass-plate from the door, and refused to allow the plaintiff to have access to his apartments. It appeared that the defendant let the whole of the house in separate apartments: but there was no direct evidence that the defendant had actually entered the plaintiff's rooms. This action was commenced early in *February*, 1846.

On the part of the defendant, it was insisted that the charge of breaking and entering the plaintiff's rooms



was not proved, and that the removal of the brass-plate was mere aggravation.

The jury returned a verdict for the plaintiff, by the direction of the judge severing the damages—10*l.* for the breaking and entering, and 20*l.* for the removal of the brass-plate; leave being reserved to the defendant to move to enter a verdict for him, or a nonsuit, if the court should be of opinion that there was no evidence of a breaking and entering, and that the removal of the brass-plate was not a substantive trespass.

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*Byles*, Serjt., in *Trinity* term, obtained a rule nisi accordingly, and also for a new trial, on the ground that there was no evidence to justify the verdict.

*Wilkins*, Serjt., and *G. T. White*, now shewed cause. There clearly was evidence to go to the jury of a breaking and entering the rooms; for, it is not to be supposed that the defendant refused the plaintiff access to them for the mere purpose of keeping them empty. As to the plate, the plaintiff did not part with the possession of it, by placing it, with the landlord's assent, on the outer door. Its removal was as much a substantive act of trespass as the removal of a pier-glass from the walls of the apartments. [*Maule*, J. The wall would be demised to the tenant for all the purposes for which he might legitimately use it. Here, there is nothing more than a licence to affix the plate to the door. The difficulty, however, is, that there is a distinct issue joined on the possession of the plate.] It may be that the transaction amounts to a demise of so much of the door as was necessary to fix the plate on. In *Welch v. Nash* (a), in trespass for breaking and entering a close and cutting &c. rails of the plaintiff, it

(a) 8 *East*. 394.



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was held that the defendant could not justify, under the general issue, the cutting the posts and rails, though erected on the defendant's own land; there being no question raised as to the property remaining in the plaintiff. The present case is altogether different from *Taylor v. Cud* &c. as explained in *Bask v. Parker*. (b)

*Byles, Serjeant and Pashley*, in support of the rule. The charge of breaking and entering the plaintiff's rooms was not sustained by the mere proof of the plaintiff being obstructed and refused access to them. The case is very like that of *Hurtley v. Blarham*. (c) There, the defendant, claiming a sum of money as due to him from the plaintiff, his lodger, locked up the plaintiff's goods in a room which he held of the defendant, and in which the plaintiff had put them, kept the key, and refused the plaintiff access to them, saying that nothing should be removed till the defendant's bill was paid: and it was held that this was not such a taking of the goods as would sustain an action of trespass. Lord Denman there says: "Cases like the present must often have occurred; yet there is no authority for an action of trespass under the circumstances. The case differs from that of a distress, where the landlord asserts that he takes the goods, and thereby acquires an authority and power of control over them. And, even in such a case of taking, it has never been held that trespass would lie if the act was wrongful." [*Maule, J.* Probably there was no exclusive possession in that case: the position of the plaintiff might have been like that of a lodger at an inn; having a mere easement of sleeping in one room, and eating and drinking in another; in

(a) 3 T. R. 294.

(c) 3 Q. B. 701.

(b) 1 N. C. 72., 4 M. &  
 Scott, 588.



which case, the refusing him access to the goods, would not be a *trespass*.] That which is complained of here is a mere obstruction or exclusion of the plaintiff from the exercise of a right of way. In *Wells v. Ody*, *Maule*, B., suggested that both case and trespass might be maintained. In *Raine v. Alderson* (a), there were two actions; and both verdicts were sustained. [*Maule*, J. No doubt, if the plaintiff has sustained two actionable injuries, he may have two distinct remedies.]

As to the brass-plate, it must be assumed, on the evidence, that it was attached to the door in the usual way, and thereby affixed to the freehold; and, if so, its removal by the defendant could not be a trespass. In *Stocks v. Booth* (b), it was said by *Buller*, J., that trespass would not lie for disturbing the plaintiff in his possession of a pew in a church; because, as was said by *Dallas*, C. J., in *The Duke of Newcastle v. Clark* (c), the plaintiff had not the exclusive possession, the possession of the church being in the parson. [*Maule*, J. I suppose that means that the plaintiff had not *any* possession.] The case might have been different, if *trover* had been brought; for, one may *qualify*, though not *increase* a tort: 2 *Wms. Saund.* 47 *bb*, and the cases there cited. Assuming that the plate was not permanently fixed to the freehold, it would be a mere chattel; and trespass will not lie for the simple receiving of a chattel. In *Bro. Abr. Trespass*, pl. 216. (d), it is said: “Nota, par *Fineux et Tremayle*, JJ., si jeo baile biens a un home, que les done ou vend a un estrange, lestrange eux prist sans livery, jaurai trespas; car par le done (e) ou vende (g) le property nest change, mes par le prisel; mes si le bailee eux livèr al estrange, jeo naurai trespas. Et si enfant done

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(a) 4 *N. C.* 702., 6 *Scott*, 39, pl. 48., which is transcribed  
691. *verbatim Fitz. Abr. Tresp.* pl.

(b) 1 *T. R.* 666. 245.

(c) 2 *J. B. Moore*, 288.

(e) *Vide* 2 *M. & G.* 691, n.

(d) Citing *M.* 21 *H.* 7, fo.

(g) *Vide* 5 *M. & R.* 658, n.



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ou vende ses biens et eux liver, trespas ne gist; contra si lauter eux prist per le done ou vende sans livery. *Rede*, contra del case del bailee; tamen *Fineux* et *Tremayle* estoyent ut suprà." In *Comyns's Digest* (a) it is said, that "trespass lies by the party to whom the wrong is done, though damage to him be only by consequence: as, it lies by an husband alone for the battery or threatening of his wife, *per quod consortium amisit*, or *negotia infecta remanserunt*, &c. So, it lies for the battery of a servant, *per quod servitium amisit*. So, it lies for a master for the battery of his servant, *per quod*, &c., after the death of the servant." In *Bennett v. Alcott* (b), it was held that a father may maintain trespass for breaking &c. his house, and debauching his daughter, *per quod servitium amisit*, though the daughter be above twenty-one years of age, where acts of service are proved, though there be no contract for service: but that, licence to enter the plaintiff's house, if pleaded, was a bar to the action, but could not be given in evidence under the general issue. [*Maule, J.* There, the whole was laid as one act.] In *Kavanagh v. Gudge* (c), *A.* let premises to *B.* by an agreement which contained the usual clauses for payment of rent and for repairing the premises, and also a clause, that, in case of non-payment of the rent, or non-performance of the conditions, it should be lawful for *A.*, without any demand, to enter upon and take possession of the premises, and expel *B.* therefrom, without any legal process; and that, in case of such entry, and of any action being brought for the same, the defendant might plead leave and licence of *B.* to *A.* for the entry or trespasses complained of. In an action of trespass by *B.* against *C.* for breaking and entering &c., and *assaulting* the plaintiff, *C.* pleaded leave and licence. It appeared, that, rent being in arrear from *B.* to *A.*, *C.*, under a written order from *A.*, had

(a) Tit. *Trespass*, (B. 5.)

(b) 2 T. R. 166.

(c) 7 M. &amp; G. 316., 7 Scott,

N. R. 1025.



entered, and forcibly expelled *B.* The foregoing agreement was given in evidence: and it was held, that the plea was sustained by the evidence; and that, as the plaintiff had not new-assigned any excess, the assault was merely an aggravation of the principal trespass, and was covered by the plea. [*Wilde, C. J. Woodward v. Walton* (*a*) seems to shew that trespass is maintainable for the seduction of a daughter. (*b*)] In the recent case of *Grinnell v. Wells* (*c*), an action upon the case was held to be the proper remedy for an injury of that sort. Here, the declaration merely charges the removal of the plate as an aggravation of the principal trespass: and the plate was not so in the plaintiff's possession as to entitle him to maintain such an action.

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WILDE, C. J. One ground upon which this rule was moved, is, that there was no evidence to go to the jury, in support of so much of the declaration as alleges a trespass to the plaintiff's rooms, and ejecting him therefrom, and seizing his goods. The evidence offered, was, that the plaintiff had taken apartments in the house in question, for a certain term; and that, before that term had expired, the defendant refused to permit the plaintiff to have access to them. It appears to me that that was competent evidence to submit to the jury, and that it afforded a reasonable foundation for a verdict for the plaintiff. The period of time during which the plaintiff was excluded, the nature of the property, and the other surrounding circumstances, were all proper to be taken into the account in determining whether or not it was to be presumed that the defendant broke and entered the rooms. It appeared that the apartments in question were open, and that the defendant took advantage of the temporary absence of the plaintiff, to fasten the outer

(*a*) 2 *N. R.* 476.(*c*) 7 *M. & G.* 1033., 8(*b*) And see *Eager v. Grimwood*, 1 *Exch.* 61.*Scott, N. R.* 741.



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door, and so exclude the plaintiff from his lodgings. Considering that the whole house was let out in separate suites of apartments, and that the defendant refused to permit the plaintiff to return to the rooms, what is the reasonable intendment of the use to which the defendant would put them? Out of court, no one would for a moment doubt that he would at once enter them for his own occupation or for the purpose of letting. All the circumstances were proper to be submitted to the jury, and could not properly be withheld from them: and I see no ground for saying that the inference they have drawn was incorrect. The first ground of the motion, therefore, fails.

The second ground of complaint is as to the removal of the brass-plate from the outer door. It is quite clear that this brass-plate was a chattel; and therefore the possession followed the right of property, unless there were circumstances to alter or control it. It seems to have been a part of the contract of hiring, that the plaintiff was to be at liberty to put his name on the door, and to continue it there so long as he should occupy the apartments. If, then, the plate was the property of the plaintiff, and was placed upon the outer door under such a contract, what is there in the evidence to affect his right of action? Did it appear that the plate had ever been delivered to the defendant, or that there was any bailment? Not at all. All that appeared, was, that the plate was rightfully on the door, and that the defendant wrongfully removed it. The removal might amount to a distinct and substantive trespass, or to mere aggravation, according to circumstances. In the declaration it is complained of as a substantive trespass. How does the defendant treat that? If the removal of the plate was aggravation only, he was not bound to plead to it. He, however, takes a distinct issue on the possession of the plate. The parties, therefore, go down to trial, treating this as a substantive act of trespass to a chattel in



he possession of the plaintiff. If the defendant had meant to contend that the plate was so fixed to the freehold as to have ceased to be a chattel, he should have shewn how it was in fact fastened. The course of pleading necessarily threw the plaintiff off his guard. Both parties having from the beginning to the end treated the brass-plate as a distinct chattel, I am clearly of opinion that it was not competent to the defendant to change his ground. *Welsh v. Nash* is a very analogous case. It was an action for breaking and entering certain closes, and breaking down and destroying gates, posts, rails, &c. of the plaintiff. The main question was, whether the justices had power, under the general highway act, 13 G. 3. c. 78., to stop up an old way before a new one had been set out. The defendant contended, under the general issue, that the posts, being fixed on the defendant's land, became his property. But the court said that the defendant made it part of his complaint that the plaintiff had put *his* posts and rails on the defendant's land across the highway; and the case reserved shewed that the posts and rails were meant to be stated as the property of the plaintiff: and therefore that the cutting them could not be justified under the general issue. The brass-plate in this case having been treated as a distinct and independent chattel, and being capable of being so fastened to the door as to retain that character, I am of opinion that the jury were justified in so dealing with it, and that their verdict was right.

On both grounds, therefore, I think the rule should be discharged.

MAULE, J. I am of the same opinion. As to the first point, the evidence is to be looked at with reference to the subject-matter in respect of which the trespass complained of was committed. The plaintiff complains that the defendant broke and entered his rooms,

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and ejected and expelled him therefrom. The evidence was, that the plaintiff, being tenant of certain rooms in the defendant's house, and seeking to be let in, the defendant unlawfully kept him out. That clearly was evidence whence a jury might reasonably and properly infer that the defendant did, in fact, enter and take possession of the plaintiff's rooms. It cannot be assumed that the defendant never went into the rooms himself.

As to the brass-plate, it was throughout treated as a chattel: and no doubt it was so fixed as to be capable of being removed without injury to the door. The property, therefore, not being divested out of the plaintiff, the verdict was founded upon evidence that might fairly lead the jury to such a conclusion. As to the conversion of the plate being aggravation only, that argument is not now open to the defendant; it having been treated in the pleadings, as well as at the trial, as a substantive trespass.

CRESSWELL, J. I also am of opinion that this rule should be discharged. With respect to the trespass in breaking and entering the plaintiff's apartments, there was, I think, abundant evidence to warrant the jury in inferring that the defendant had entered and resumed possession. The case is widely different from *Hartley v. Bloxham*: there, it was quite clear that the defendant never touched the goods at all; he merely locked the door of the room they were in, and kept the key: but here, there was evidence from which the jury were at liberty to infer that the defendant had actually entered and kept possession of the rooms.

With respect to the removal of the brass-plate, it was pleaded to, and throughout the cause treated, as a substantive trespass. No question was made as to whether it was a thing affixed to the freehold or not. It is, therefore, too late now to urge that point. There was



nothing like a bailment. There was no delivery of the plate to the landlord, to be re-delivered upon request, or otherwise. The substance of the contract was, that the plaintiff was to be allowed to have the custody of it in a particular place. I see no reason for disturbing the verdict as to that. After all, whether the removal of the plate was a substantive trespass, or aggravation only, is mere matter of form: the plaintiff would equally be entitled to damages in either view.

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V. WILLIAMS, J. I am of the same opinion. It is contrary to common sense to say that there was nothing to leave to the jury in this case. And I think the jury were well warranted in inferring that the defendant did enter and take possession of the rooms in question.

It is unnecessary to decide whether or not trespass could be maintained for the removal of a chattel permanently fixed to the freehold. The general rule undoubtedly is, *Quicquid plantatur solo, solo cedit*. But that point was not raised at the trial: and, on the pleadings, the brass-plate was treated, as we must now assume it to be, as an independent chattel. If so, it is quite clear that the plaintiff had both the right of possession and the right of property. If he himself had taken it off the door and sold it, no one would have had a right to complain. *Kavanagh v. Gudge* was quite a different case: that which was treated as aggravation there might have been made the subject of a new-assignment: here, it is difficult to say that the plaintiff might have new-assigned as to the plate. *Griffiths v. Dunnett (a)* shews that a plea addressed to matter of aggravation merely, is bad; and it does not lie in the mouth of the defendant to say that he has pleaded a bad plea. Had it been necessary I should have had no hesitation in saying that this was properly the subject of an action of trespass.

Rule discharged.

(a) 7 M. &amp; G. 1002., 8 Scott, N. R. 836.



## NORTON v. SEYMOUR and AYRES.

Jan. 13.

IN THE COMMON  
LAW COURT OF THE  
COUNTY OF MIDDLESEX.  
The first count was upon a promissory note  
purporting to be made by "Thomas Seymour and Sarah Ayres." There were also counts for  
goods sold and delivered, work and labour, and money  
laid out upon an account stated.  
The defendant Seymour suffered judgment by default.  
The other defendant pleaded, to the first count, that  
he did not make the note, and, to the rest of the de-  
claration, non assumpsit.  
The cause was tried before the undersheriff of Surrey  
on the 13th of December last. The note was produced.  
It began, "Two months after date, we promise to pay,"  
and was signed "Thomas Seymour, Sarah Ayres"  
in the handwriting of Seymour.  
It appeared that the defendant Ayres had formerly  
resided and carried on business at the place at which the  
goods in respect of which the note was given had been  
supplied. In order to shew that she was a partner with  
Seymour, the plaintiff called a witness who deposed to a  
conversation with her upon the subject of the note, in  
which conversation she admitted that she was a partner  
with Seymour. A circular and invoice issued by Seymour  
were then put in: the circular stating that the business  
would in future be carried on in the names of Seymour  
and Ayres, and the invoice being "headed Seymour  
and Ayres."  
It was objected, on the part of the defendant Ayres,  
that a signature of the note by the names and surnames of the  
respective parties, was a sufficient signature to charge the partnership.  
Quære, whether, in the absence of a special authority, one partner can bind  
another by a signature other than that of the usual style of the firm.

ASSUMPSIT. The first count was upon a pro-

The defendant Seymour suffered judgment by default. The other defendant pleaded, to the first count, that he did not make the note, and, to the rest of the de-  
claration, non assumpsit.

The cause was tried before the undersheriff of Surrey on the 13th of December last. The note was produced. It began, "Two months after date, we promise to pay," and was signed "Thomas Seymour, Sarah Ayres" in the handwriting of Seymour.

It appeared that the defendant Ayres had formerly resided and carried on business at the place at which the goods in respect of which the note was given had been supplied. In order to shew that she was a partner with Seymour, the plaintiff called a witness who deposed to a conversation with her upon the subject of the note, in which conversation she admitted that she was a partner with Seymour. A circular and invoice issued by Seymour were then put in: the circular stating that the business would in future be carried on in the names of Seymour and Ayres, and the invoice being "headed Seymour and Ayres."

It was objected, on the part of the defendant Ayres,

that a signature of the note by the names and surnames of the respective parties, was a sufficient signature to charge the partnership.

Quære, whether, in the absence of a special authority, one partner can bind another by a signature other than that of the usual style of the firm.



that this circular was not admissible to charge her, there being no evidence to connect her with it. The undersheriff, however, received it.

It was then submitted, that, assuming that a partnership subsisted between them, *Seymour* had no authority to bind *Ayres* by a bill or note signed otherwise than with the name of the firm.

This objection also was overruled; and it was left to the jury to say whether or not there was a partnership.

The jury returned a verdict for the plaintiff, damages 18*l.* 1*s.* 3*d.*

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*Fortescue*, on behalf of the defendant *Ayres*, now moved for a new trial, on the grounds of improper reception of evidence, and misdirection. The circular was clearly inadmissible. [*Cresswell*, J. There was evidence for the jury before that document was put in. *Maule*, J. If evidence for any purpose, the circular could not be excluded.] It was allowed to go to the jury as evidence of the alleged partnership: it could not have been offered for any other purpose. [*Maule*, J. might have been evidence of an authority to *Seymour* sign notes in the names of *Seymour* and *Ayres*. *Vilde*, C. J. It was also material as tending to confirm witness who spoke to the conversation.] At all events, it is quite clear, that, if *Seymour* had authority to bind the defendant *Ayres* by signing notes or bills, his signature should have been in accordance with the circular — “*Seymour & Ayres* ;” for, one partner has authority to bind another except by the name of the firm: *Kirk v. Blurton*. (a)

*VILDE, C. J.* It does not appear to me that there is any ground laid for granting a rule in this case. The



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circular was clearly admissible. It might bear on the case in two or three ways. It was proved that the defendant *Ayres* had said, when called on, that she considered herself a partner; and that the business was carried on in her name jointly with that of *Seymour*, and at the place where it had formerly been carried on by her, and where she had resided. The case cited does not sustain the objection to the form of the note. The circular stated that the business would in future be carried on in the names of *Seymour* and *Ayres*; and the note was signed in the names of *Seymour* and *Ayres*, with the addition of their respective christian names. *Kirk v. Blurton* was a totally different case. There, the bill was accepted in a name which did not purport to be that of the firm, and therefore it could not be considered as having been issued for the purposes of the firm.

MAULE, J. I agree, that, in this case, no rule should be granted. As to the form of the note, it is to be observed that it is signed by *Seymour* in the name of himself and the other member of the firm. Suppose there was no authority so to sign it, other than the general authority conferred by the partnership, I should hesitate to say that one of two partners could not bind the other by signing the true names of both, instead of the fictitious name. That, however, is not the question here. The circular states that the business will in future be carried on in the names of *Seymour* and *Ayres*; that is, in the names of the two persons mentioned, whatever those names may be. “*Thomas Seymour*” is the name of the one, and “*Sarah Ayres*” that of the other. There is, therefore, sufficient evidence of a special authority to sign the note in those names, if such special authority were necessary.

CRESSWELL, J., and V. WILLIAMS, J., concurred.

Rule refused.



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## NEWTON and Wife v. BOODLE and Three Others.

Jan. 15.

**TRESPASS.** The declaration alleged that the defendants, on the 15th of *February*, 1844, with force and arms assaulted the said *Letitia-Frances-Henry* (then and still being the wife of the said *Augustus Newton*), and then beat, bruised, and ill-treated her, and seized and laid hold of her, and with great force and violence pulled and dragged her about, and also then forced and compelled her to go from and out of a certain dwelling-house then in the lawful and exclusive occupation of the said *Augustus Newton*, into divers streets and highways, and then forced and compelled her to go into a certain carriage, to wit, a coach, drawn by a certain horse, into and along divers public streets and highways, to a certain prison, to wit, the common gaol of the county of *Gloucester*, and then imprisoned her, and kept and detained her in prison, to wit, in the said gaol, without any reasonable or probable cause whatsoever, for a long time, to wit, for twelve days then next following, contrary to law, and against her will;

The rule as to a term's notice of proceeding, where no step has been taken for more than four terms, does not apply to a proceeding after verdict.

Where a party has lost the benefit of a bill of exceptions tendered to the ruling of a judge at nisi prius, or at the assizes, by the death of the judge, and without any default on his own part, it

is not competent to another judge of the court out of which the record issues, to seal the bill of exceptions.

But in such a case the court will, where the circumstances warrant it, allow the party to move for a new trial, notwithstanding the proper time for so doing has elapsed.

In trespass by *A.* and *B.*, his wife, against *C.* for a false imprisonment of *B.*, *C.* justified under an execution against the plaintiffs for costs in a former action brought by them against *C.*; alleging the recovery of the judgment, the issuing of the *ca. sa.*, its delivery to the sheriff, and the arrest of *B.* thereunder. The plaintiffs replied — confessing the recovery of the judgment, and the issuing of the *ca. sa.* — *de injuriâ suâ propriâ, absque residuo causæ*: — Held, that, — as the judgment and writ were admitted on the record, — upon the warrant, and the arrest of *B.* under it, being proved by the plaintiffs, the justification was made out, without any evidence on the part of the defendant.



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whereby the said *Lætitia-Frances-Henry* was then, not only greatly hurt, bruised, and wounded, and underwent and suffered great agony of mind and body, but was also then greatly exposed to the inclemency of the weather, and injured in her health, credit, and circumstances; and other wrongs to the said *Lætitia-Frances-Henry* the defendants then did, &c., to the damage of the said *Augustus Newton* and *Lætitia-Frances-Henry*, his wife, of 5000*l.*, &c.

The defendants *Boodle* and *Norcutt* together pleaded — first, not guilty — secondly (as to the said supposed assaulting &c. of the said *Lætitia-Frances-Henry*, and seizing and laying hold of her, and forcing and compelling her to go from and out of the said dwelling-house into the said streets and highways, and forcing and compelling her to go into the said carriage, into and along the said public streets and highways, to the said prison, and then imprisoning her, and keeping and detaining her in prison for the said space of time in the declaration mentioned, above alleged to have been done), that, theretofore, and after the intermarriage of the plaintiffs, and before the said time when &c., to wit, on the 15th of *February*, 1843, a certain action on the case was commenced and instituted in the court of our lady the now Queen of the Bench at *Westminster*, in the county of *Middlesex*, by the now plaintiffs, against the defendants *Rowe* and *Norman*, to recover damages for and on account of a certain alleged libel upon the said *Lætitia-Frances-Henry*, alleged to have been composed and published by the defendants *Rowe* and *Norman* of and concerning the said *Lætitia-Frances-Henry*, and to the alleged damage of the said *Augustus Newton* and the said *Lætitia-Frances-Henry*, his wife; that such proceedings were thereupon had in the said court in the said action, that, afterwards, to wit, on the 24th of *June*, 1843, it was, in the said action, considered by the



aid court that the plaintiffs should take nothing by their said writ, but that they should be in mercy &c., and that the defendants *Rowe* and *Norman* should go hence without day &c., and it was further considered by the said court that the defendants *Rowe* and *Norman* should recover against the now plaintiffs 73*l.* 18*s.* 6*d.*, for their costs and charges by them about their defence on that behalf laid out and expended, by the said court there adjudged to the defendants *Rowe* and *Norman*, and with their assent, according to the form of the statute in that case made and provided, and that the defendants *Rowe* and *Norman* should have execution thereof &c., as by the record and proceedings thereof still remaining in the said court of our said lady the Queen of the Bench aforesaid, at *Westminster* aforesaid, more fully and at large appears; that the said judgment being in full force, and the said sum of 73*l.* 18*s.* 6*d.* therein mentioned, and so adjudged to the defendants *Rowe* and *Norman* as aforesaid, and every part thereof, being unpaid and unsatisfied, the defendant *Boodle*, as the lawful attorney of and for the defendants *Rowe* and *Norman*, and by virtue of their retainer in that behalf, by and through his agent, the defendant *Norcutt*, and the defendant *Norcutt*, as the agent of and for *Boodle*, afterwards, and before the said time when &c., to wit, on the 7th of *July*, 1843, caused and procured to be issued out of the said court of our lady the Queen of the Bench aforesaid, at *Westminster* aforesaid, upon the said judgment, a certain writ of our said lady the Queen, called a *capias ad satisfaciendum*, against the plaintiffs, directed to the sheriff of the county of *Gloucester*, by which said writ our said lady the Queen commanded the said sheriff that he should take the now plaintiffs, if they should be found in his bailiwick, and keep them safely keep, so that the sheriff might have their bodies before Her said Majesty's justices at *Westminster*

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immediately after the execution of the said writ, to satisfy the defendants *Rowe* and *Norman* the said sum of 73*l.* 18*s.* 6*d.* by the said judgment so adjudged to them, *Rowe* and *Norman*, as aforesaid, together with interest upon the said sum of 73*l.* 18*s.* 6*d.*, &c.; that such writ, afterwards, and before the delivery thereof to the said sheriff to be executed, as thereafter mentioned, to wit, on the said 7th of *July* in the year aforesaid, was *duly* (a) indorsed with a direction to the said sheriff, requiring him *to levy* the said sum of 73*l.* 18*s.* 6*d.* and interest &c.; that such writ, so indorsed as aforesaid, the defendant *Boodle*, as such attorney as aforesaid, by and through his agent as aforesaid, and the defendant *Norcutt*, as such agent as aforesaid, and as they lawfully might, afterwards, and before the return thereof, and also before the said time when &c., and whilst the said moneys by the said judgment so adjudged to *Rowe* and *Norman* as aforesaid, and every part thereof, remained due and unpaid and unsatisfied, to wit, on the said 7th of *July*, in the year last aforesaid, delivered to the sheriff of *Gloucestershire*, to wit, *Joseph Yorke, Esq.*, then being such sheriff, to be executed in due form of law; that, by virtue of such writ, and according to the exigency thereof, the said sheriff of *Gloucestershire*, that is to say, the said *Joseph Yorke, Esq.*, afterwards, and before the return of the said writ, and whilst the said moneys by the said judgment so awarded to the defendants *Rowe* and *Norman* as aforesaid, and every part thereof, remained unpaid and unsatisfied, to wit, on the day and year in the declaration mentioned, being the said time when &c., and within his bailiwick as such sheriff, that is to say, at *Cheltenham*, in the county of *Gloucester* aforesaid, took and arrested the plaintiff *Lætitia-Frances-Henry* by her body, in the said dwell-

(a). *Quære.*



ing-house in the declaration mentioned, and, because it was then, to wit, at the said time when &c. (the said *Lætitia-Frances-Henry* having been so arrested as aforesaid), necessary and expedient, in order to keep and detain her in safe custody under and by virtue of the said writ, according to the exigency thereof, that she should be taken by and in the custody of the said sheriff out of the said dwelling-house in the declaration mentioned (the same not being a place where the said *Lætitia-Frances-Henry* could be kept in safe custody by the sheriff, in pursuance of the said writ, to some place in the bailiwick of the said sheriff where she might be kept in the safe custody of the said sheriff as aforesaid, under and by virtue of the said writ to the said sheriff so directed and delivered as aforesaid, the said sheriff then, to wit, at the said time when &c., under and by virtue of the said writ, forced and compelled her to go from and out of the said dwelling-house in the declaration mentioned, into the said streets and highways in the declaration mentioned; and, because it was then necessary and expedient, reasonable, and proper, that the said *Lætitia-Frances-Henry* should be carried and conveyed in a carriage, rather than walk, to the said place in the said bailiwick of the said sheriff as aforesaid, where she might be kept in such safe custody as aforesaid, he, the sheriff, in order to carry her in his said custody as aforesaid with as little inconvenience to herself as possible, at the said time when &c., under and by virtue of the said writ, forced and compelled her to go into the said carriage, into and along the said public streets and highways, to the said prison in the declaration mentioned, the same then being the common gaol of the said county of *Gloucester*, and the reasonable and proper place for her to be kept in the said custody of the said sheriff as aforesaid, under and by virtue of the said writ, and there, in the said prison, imprisoned

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## NORTON v. SEYMOUR and AYRES.

Jan. 15.

In an action against *A. B.* and *C. D.* upon a promissory note signed by *A. B.* in the names of himself and *C. D.*, it appeared that the business in respect of which the note was given, had formerly been carried on by *C. D.*, and that *C. D.* had admitted that she was a partner:—Held, that a circular issued by *A. B.*, stating that “the business would in future be carried on in the name of *B. and D.*,” was admissible in evidence, though not distinctly brought home to *C. D.*

**ASSUMPSIT.** The first count was upon a promissory note purporting to be made by “*Thomas Seymour and Sarah Ayres.*” There were also counts for goods sold and delivered, work and labour, and money found due upon an account stated.

The defendant *Seymour* suffered judgment by default. The other defendant pleaded, to the first count, that she did not make the note, and, to the rest of the declaration, non assumpsit.

The cause was tried before the undersheriff of *Surrey* on the 15th of *December* last. The note was produced. It began, “Two months after date, we promise to pay,” &c., and was signed “*Thomas Seymour, Sarah Ayres*” — in the handwriting of *Seymour*.

It appeared that the defendant *Ayres* had formerly resided and carried on business at the place at which the goods in respect of which the note was given had been supplied. In order to shew that she was a partner with *Ayres*, the plaintiff called a witness who deposed to a conversation with her upon the subject of the note, in which conversation she admitted that she was a partner with *Seymour*. A circular and invoice issued by *Seymour* were then put in; the circular stating that the business would in future be carried on in the names of *Seymour* and *Ayres*, and the invoice being “headed *Seymour and Ayres.*”

It was objected, on the part of the defendant *Ayres*,

Held also, that a signature of the note by the names and surnames of the respective parties, was a sufficient signature to charge the partnership.

*Quære*, whether, in the absence of a special authority, one partner can bind another by a signature other than that of the usual style of the firm.



that this circular was not admissible to charge her, there being no evidence to connect her with it. The undersheriff, however, received it.

It was then submitted, that, assuming that a partnership subsisted between them, *Seymour* had no authority to bind *Ayres* by a bill or note signed otherwise than with the name of the firm.

This objection also was overruled; and it was left to the jury to say whether or not there was a partnership.

The jury returned a verdict for the plaintiff, damages 13*l.* 1*s.* 3*d.*

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*Fortescue*, on behalf of the defendant *Ayres*, now moved for a new trial, on the grounds of improper reception of evidence, and misdirection. The circular was clearly inadmissible. [*Cresswell*, J. There was evidence for the jury before that document was put in. *Maule*, J. If evidence for any purpose, the circular could not be excluded.] It was allowed to go to the jury as evidence of the alleged partnership: it could not have been offered for any other purpose. [*Maule*, J. It might have been evidence of an authority to *Seymour* to sign notes in the names of *Seymour* and *Ayres*. *Wilde*, C. J. It was also material as tending to confirm the witness who spoke to the conversation.] At all events, it is quite clear, that, if *Seymour* had authority to bind the defendant *Ayres* by signing notes or bills, the signature should have been in accordance with the circular — “*Seymour & Ayres* ;” for, one partner has no authority to bind another except by the name of the firm: *Kirk v. Blurton*. (a)

WILDE, C. J. It does not appear to me that there is any ground laid for granting a rule in this case. The

(a) 9 *M. & W.* 284.



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circular was clearly admissible. It might bear on the case in two or three ways. It was proved that the defendant *Ayres* had said, when called on, that she considered herself a partner; and that the business was carried on in her name jointly with that of *Seymour*, and at the place where it had formerly been carried on by her, and where she had resided. The case cited does not sustain the objection to the form of the note. The circular stated that the business would in future be carried on in the names of *Seymour* and *Ayres*; and the note was signed in the names of *Seymour* and *Ayres*, with the addition of their respective christian names. *Kirk v. Blurton* was a totally different case. There, the bill was accepted in a name which did not purport to be that of the firm, and therefore it could not be considered as having been issued for the purposes of the firm.

MAULE, J. I agree, that, in this case, no rule should be granted. As to the form of the note, it is to be observed that it is signed by *Seymour* in the name of himself and the other member of the firm. Suppose there was no authority so to sign it, other than the general authority conferred by the partnership, I should hesitate to say that one of two partners could not bind the other by signing the true names of both, instead of the fictitious name. That, however, is not the question here. The circular states that the business will in future be carried on in the names of *Seymour* and *Ayres*; that is, in the names of the two persons mentioned, whatever those names may be. "*Thomas Seymour*" is the name of the one, and "*Sarah Ayres*" that of the other. There is, therefore, sufficient evidence of a special authority to sign the note in those names, if such special authority were necessary.

CRESSWELL, J., and V. WILLIAMS, J., concurred.

Rule refused.



ceedings should be reopened after so great a delay. As, however, we have not the facts sufficiently before us to enable us to determine how far the plaintiffs are to be held responsible for this delay, and with a view to prevent a failure of justice by reason of the happening of an event beyond human control, we think a rule may go, calling upon the defendants to shew cause why there should not be a new trial upon the point as to the sufficiency of the evidence to fix *Norman*.

It may also be open to the plaintiffs to shew that the judgment was improperly signed, for want of a term's notice; though it would seem from Lord *Ellenborough's* judgment in *May v. Wooding*, that the rule of *Easter, 13 G. 2.*, does not apply after verdict.

As to the other part of the motion, however, which prays that one of the other judges may seal the bill of exceptions, I think we have no power whatever to make such a rule. The statute 13 *Edw. 1. c. 31.* applies only to cases where certain other judges have been associated with the chief justice, (a) or other presiding judge, (b) and have been parties to the proceeding, and not to a case at nisi prius or at the assises. (c)

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*Talfourd* and *Channell*, Serjts., and *Cowling*, now shewed cause. There clearly was no evidence whatever to submit to the jury affecting *Norman*. There is, therefore, no ground for a new trial. *May v. Wooding* is a distinct authority to shew that the rule as to a term's notice, applies only to proceedings anterior to the verdict. Lord *Ellenborough* there says: "The reason of the rule is this, that, while the matter is still in controversy, the party should, after so long a lapse as four terms without any proceedings, have notice, that he

(a) *Vide Enfield v. Hall*, 2 named in a commission of  
*Lev. 236.* assise.

(b) As judges and serjeants (c) *Sed vide supra (b).*



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whereby the said *Lætitia-Frances-Henry* was then, not only greatly hurt, bruised, and wounded, and underwent and suffered great agony of mind and body, but was also then greatly exposed to the inclemency of the weather, and injured in her health, credit, and circumstances; and other wrongs to the said *Lætitia-Frances-Henry* the defendants then did, &c., to the damage of the said *Augustus Newton* and *Lætitia-Frances-Henry*, his wife, of 5000*l.*, &c.

The defendants *Boodle* and *Norcutt* together pleaded — first, not guilty — secondly (as to the said supposed assaulting &c. of the said *Lætitia-Frances-Henry*, and seizing and laying hold of her, and forcing and compelling her to go from and out of the said dwelling-house into the said streets and highways, and forcing and compelling her to go into the said carriage, into and along the said public streets and highways, to the said prison, and then imprisoning her, and keeping and detaining her in prison for the said space of time in the declaration mentioned, above alleged to have been done), that, theretofore, and after the intermarriage of the plaintiffs, and before the said time when &c., to wit, on the 15th of *February*, 1843, a certain action on the case was commenced and instituted in the court of our lady the now Queen of the Bench at *Westminster*, in the county of *Middlesex*, by the now plaintiffs, against the defendants *Rowe* and *Norman*, to recover damages for and on account of a certain alleged libel upon the said *Lætitia-Frances-Henry*, alleged to have been composed and published by the defendants *Rowe* and *Norman* of and concerning the said *Lætitia-Frances-Henry*, and to the alleged damage of the said *Augustus Newton* and the said *Lætitia-Frances-Henry*, his wife; that such proceedings were thereupon had in the said court in the said action, that, afterwards, to wit, on the 24th of *June*, 1843, it was, in the said action, considered by the



said court that the plaintiffs should take nothing by their said writ, but that they should be in mercy &c., and that the defendants *Rowe* and *Norman* should go thereof without day &c., and it was further considered by the said court that the defendants *Rowe* and *Norman* should recover against the now plaintiffs 73*l.* 18*s.* 6*d.*, for their costs and charges by them about their defence in that behalf laid out and expended, by the said court there adjudged to the defendants *Rowe* and *Norman*, and with their assent, according to the form of the statute in that case made and provided, and that the defendants *Rowe* and *Norman* should have execution thereof &c., as by the record and proceedings thereof still remaining in the said court of our said lady the Queen of the Bench aforesaid, at *Westminster* aforesaid, more fully and at large appears; that the said judgment being in full force, and the said sum of 73*l.* 18*s.* 6*d.* therein mentioned, and so adjudged to the defendants *Rowe* and *Norman* as aforesaid, and every part thereof, being unpaid and unsatisfied, the defendant *Boodle*, as the lawful attorney of and for the defendants *Rowe* and *Norman*, and by virtue of their retainer in that behalf, by and through his agent, the defendant *Norcutt*, and the defendant *Norcutt*, as the agent of and for *Boodle*, afterwards, and before the said time when &c., to wit, on the 7th of *July*, 1843, caused and procured to be issued out of the said court of our lady the Queen of the Bench aforesaid, at *Westminster* aforesaid, upon the said judgment, a certain writ of our said lady the Queen, called a *capias ad satisfaciendum*, against the plaintiffs, directed to the sheriff of the county of *Gloucester*, by which said writ our said lady the Queen commanded the said sheriff that he should take the now plaintiffs, if they should be found in his bailiwick, and them safely keep, so that the sheriff might have their bodies before Her said Majesty's justices at *Westminster*

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immediately after the execution of the said writ, to satisfy the defendants *Rowe* and *Norman* the said sum of 73*l.* 18*s.* 6*d.* by the said judgment so adjudged to them, *Rowe* and *Norman*, as aforesaid, together with interest upon the said sum of 73*l.* 18*s.* 6*d.*, &c.; that such writ, afterwards, and before the delivery thereof to the said sheriff to be executed, as thereafter mentioned, to wit, on the said 7th of *July* in the year aforesaid, was *duly* (a) indorsed with a direction to the said sheriff, requiring him *to levy* the said sum of 73*l.* 18*s.* 6*d.* and interest &c.; that such writ, so indorsed as aforesaid, the defendant *Boodle*, as such attorney as aforesaid, by and through his agent as aforesaid, and the defendant *Norcutt*, as such agent as aforesaid, and as they lawfully might, afterwards, and before the return thereof, and also before the said time when &c., and whilst the said moneys by the said judgment so adjudged to *Rowe* and *Norman* as aforesaid, and every part thereof, remained due and unpaid and unsatisfied, to wit, on the said 7th of *July*, in the year last aforesaid, delivered to the sheriff of *Gloucestershire*, to wit, *Joseph Yorke*, Esq., then being such sheriff, to be executed in due form of law; that, by virtue of such writ, and according to the exigency thereof, the said sheriff of *Gloucestershire*, that is to say, the said *Joseph Yorke*, Esq., afterwards, and before the return of the said writ, and whilst the said moneys by the said judgment so awarded to the defendants *Rowe* and *Norman* as aforesaid, and every part thereof, remained unpaid and unsatisfied, to wit, on the day and year in the declaration mentioned, being the said time when &c., and within his bailiwick as such sheriff, that is to say, at *Cheltenham*, in the county of *Gloucester* aforesaid, took and arrested the plaintiff *Lætitia-Frances-Henry* by her body, in the said dwell-

(a). *Quære.*



ing-house in the declaration mentioned, and, because it was then, to wit, at the said time when &c. (the said *Lætitia-Frances-Henry* having been so arrested as aforesaid), necessary and expedient, in order to keep and detain her in safe custody under and by virtue of the said writ, according to the exigency thereof, that she should be taken by and in the custody of the said sheriff out of the said dwelling-house in the declaration mentioned (the same not being a place where the said *Lætitia-Frances-Henry* could be kept in safe custody by the sheriff, in pursuance of the said writ, to some place in the bailiwick of the said sheriff where she might be kept in the safe custody of the said sheriff as aforesaid, under and by virtue of the said writ to the said sheriff so directed and delivered as aforesaid, the said sheriff then, to wit, at the said time when &c., under and by virtue of the said writ, forced and compelled her to go from and out of the said dwelling-house in the declaration mentioned, into the said streets and highways in the declaration mentioned; and, because it was then necessary and expedient, reasonable, and proper, that the said *Lætitia-Frances-Henry* should be carried and conveyed in a carriage, rather than walk, to the said place in the said bailiwick of the said sheriff as aforesaid, where she might be kept in such safe custody as aforesaid, he, the sheriff, in order to carry her in his said custody as aforesaid with as little inconvenience to herself as possible, at the said time when &c., under and by virtue of the said writ, forced and compelled her to go into the said carriage, into and along the said public streets and highways, to the said prison in the declaration mentioned, the same then being the common gaol of the said county of *Gloucester*, and the reasonable and proper place for her to be kept in the said custody of the said sheriff as aforesaid, under and by virtue of the said writ, and there, in the said prison, imprisoned

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her, and kept and detained her in prison under and by virtue of the said writ, and for the cause therein specified, for the said space of time in the declaration in that behalf mentioned, as he lawfully might for the cause aforesaid, doing no unnecessary damage or inconvenience to the said *Lætitia-Frances-Henry* on the occasions aforesaid, or any of them, &c. — verification.

The defendants *Rowe* and *Norman* in like manner pleaded together — first, not guilty — secondly, a similar plea of justification under the judgment so recovered by them in the former action, and the *ca. sa.* thereon, as in the second plea of *Boodle* and *Norcutt*.

The plaintiffs joined issues upon the respective pleas of not guilty, and replied to the others — admitting the recovery of the said judgment in the said second plea mentioned, by *Rowe* and *Norman*, and the issuing of the said writ of *capias ad satisfaciendum*, in manner and form as in the said plea alleged — that the defendants *Boodle* and *Norcutt* [and *Rowe* and *Norman*], at the said time when &c. in the declaration mentioned, of their own wrong, and without *the residue* of the cause in their said second plea alleged, committed the trespasses in the introductory part of that plea mentioned, in manner and form as the plaintiffs had in their said declaration above complained against the said defendants — concluding to the country.

Issue thereon.

The cause was tried before *Tindal*, C.J., at the sittings in *London* after *Hilary* term, 1845, when the plaintiffs put in the warrant, and the sheriff's return thereto; and it appeared, that, the lady having been arrested under the *ca. sa.*, a summons was taken out to obtain her discharge, on the ground that, she being a married woman, and the action being the action of the husband, she was not liable to be taken in execution for the costs. Two of the defendants, *viz. Boodle*



and *Norcult*, attended upon the hearing of that summons, the former instructing counsel, and the latter as the attorney of the other defendants. There was also evidence to shew that what was done had been done with the sanction of *Rowe*, the third defendant. But there was no evidence that *Norman* in any way sanctioned or interfered in the proceeding, except that he was the avowed editor of the paper in which was published a letter from *Boodle* detailing the transaction; which letter was received as evidence against *Rowe*.

Under his lordship's direction, a verdict was found for the plaintiff against three of the defendants upon the issue on not guilty, and for the defendant *Norman* on that issue, and for all the defendants on the issues joined on the pleas of justification; notwithstanding it was objected on the part of the plaintiffs that there was no evidence of the judgment in the former action, or of the issuing of a *ca. sa.* thereon; the lord chief justice holding that they were admitted on the record.

The ruling of his lordship was excepted to on behalf of the plaintiffs, and a note of the exceptions, signed by counsel, was handed up to his lordship. A draft bill of exceptions was afterwards prepared by the plaintiffs, and signed by their counsel, and was, just on the eve of the summer circuit, 1845, sent to the defendants' attorney, who returned it on the 24th of *January*, 1846. The bill of exceptions was, on the 19th of *February*, delivered to the lord chief justice, in order that he might affix his seal to it. Before doing so, his lordship required to see the original note of the exceptions made at the trial. Some delay thereupon arose, and ultimately his lordship died without having sealed the bill of exceptions, which was returned to the plaintiffs on the 16th of *November* last, unsealed.

The defendants having signed judgment on the 14th of *November*, without having given a term's previous notice of their intention to proceed,

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*Newton*, for the plaintiffs, on the 20th of *November*, moved for a rule calling upon the defendants to shew cause why the judgment so signed, and the proceedings to tax costs thereupon had, should not be set aside for irregularity, with costs; and why one of the justices of this court, companions of the late Lord Chief Justice *Tindal*, deceased, should not affix the seal of the said justice companion to the bill of exceptions left with the said late lord chief justice for the purpose of being sealed by him, and returned by his clerk to the plaintiffs on the 16th of *November*, unsealed; or why the plaintiffs should not have a new trial, on the ground of misdirection, or such other relief as might seem just to the court. He submitted that the signing judgment by the defendants (a) without a term's notice, was an irregularity — referring to *May v. Wooding* (b), *Tipton v. Meeke* (c), and *Lord v. Wardle* (d); that, there having been no laches or miscarriage on the part of the plaintiffs, they ought not to be prejudiced by the death of the lord chief justice — *Cottam v. Partridge* (e); and that the statute 13 *Edw. 1. c. 31.*, which gave the right to except, empowered any one of the judges who were members of the court at the time to seal the bill of exceptions.

WILDE, C. J. If it should turn out, upon examination, that the plaintiffs have, without any fault of their own, but solely from the circumstance alluded to, lost the benefit of their bill of exceptions, the court think that the justice of the case may require that they should have an opportunity to try the cause again. At the same time, it is to be observed that there was an interval of nearly seventeen months between the day of the trial and the decease of the late chief justice; and it is rather a fearful thing to say that the whole pro-

(a) *Sed vide infra*, 808. (a).

(b) 3 *M. & S.* 500.

(c) 8 *J. B. Moore*, 579.

(d) *Ante*, p. 295.

(e) 2 *M. & G.* 843, 3 *Adm.*

*N. R.* 174.



ceedings should be reopened after so great a delay. As, however, we have not the facts sufficiently before us to enable us to determine how far the plaintiffs are to be held responsible for this delay, and with a view to prevent a failure of justice by reason of the happening of an event beyond human control, we think a rule may go, calling upon the defendants to shew cause why there should not be a new trial upon the point as to the sufficiency of the evidence to fix *Norman*.

It may also be open to the plaintiffs to shew that the judgment was improperly signed, for want of a term's notice; though it would seem from Lord *Ellenborough's* judgment in *May v. Wooding*, that the rule of *Easter*, 13 G. 2., does not apply after verdict.

As to the other part of the motion, however, which prays that one of the other judges may seal the bill of exceptions, I think we have no power whatever to make such a rule. The statute 13 *Edw.* 1. c. 31. applies only to cases where certain other judges have been associated with the chief justice, (a) or other presiding judge, (b) and have been parties to the proceeding, and not to a case at nisi prius or at the assises. (c)

*Talfourd* and *Channell*, Serjts., and *Cowling*, now shewed cause. There clearly was no evidence whatever to submit to the jury affecting *Norman*. There is, therefore, no ground for a new trial. *May v. Wooding* is a distinct authority to shew that the rule as to a term's notice, applies only to proceedings anterior to the verdict. Lord *Ellenborough* there says: "The reason of the rule is this, that, while the matter is still in controversy, the party should, after so long a lapse as four terms without any proceedings, have notice, that he

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(a) *Vide Enfield v. Hall*, 2 named in a commission of  
*Lev.* 286. assise.

(b) As judges and serjeants (c) *Sed vide suprâ* (b).



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may prepare himself: but, when the matter has passed *in rem judicatam*, by the verdict, the same reason does not apply. The rule of this court, therefore, relates merely to interlocutory stages of the cause. No instance is stated where it has been carried further; and there is no analogy to aid this case." That case is in no degree impugned by *Lord v. Wardle*. It was not necessary for the court there to determine whether a term's notice was requisite or not. Besides, if such notice was necessary here, there have been steps taken within four terms. On the 22nd of *January*, 1846, the defendants had notice to return the draft bill of exceptions, which had, some months before, been left with them for approval and counsel's signature. On the 23rd, a summons was taken out calling upon the plaintiffs to shew cause why the defendants should not have two months' further time to return it; and, on the following day, it was returned. And, in *February*, 1846, the ingrossment was left with the lord chief justice. There is, therefore, no pretence for either branch of this rule.

*Newton*, in support of his rule. The delay in perfecting the bill of exceptions was caused by a circumstance that was beyond the plaintiffs' control. As they are deprived of the benefit of their exceptions, without any default on their own part, the court will, in the exercise of its equitable jurisdiction, give them such relief as the nature of the case will admit of. In *Cottam v. Partridge*, a verdict was taken subject to a special case; and the plaintiff having refused to proceed with it, the court, at the instance of the defendant, directed a new trial, notwithstanding the period ordinarily allowed for moving for a new trial had long elapsed.

Where no proceeding has been taken for more than four terms, a term's notice is essential: the practice is clear and uniform. *Lord v. Wardle* is precisely in point.



It is said that proceedings have been taken here within four terms. But, the mere notice to the defendant's attorney to return the draft bill of exceptions, and the delivery of the engrossment to the lord chief justice, clearly were not proceedings in the cause: they were mere inchoate and imperfect and ineffectual attempts to proceed. A proceeding, within the meaning of the rule, must be something that approximates the cause to its natural termination. A summons not followed by an order, is not a proceeding: *Vines v. Mayor &c. of Reading.* (a) [Maule J. The proceeding on a bill of exceptions is not a step in the cause *in this court*: *Gardner v. Baillie.* (b) Where nothing remains to be done but entering judgment, it is competent to the party to enter it whenever he pleases. *May v. Wooding* is a distinct authority, that the rule as to a term's notice does not apply after verdict; and that is in no degree controverted by *Lord v. Wardle.*]

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WILDE, C. J. This case comes before the court under very peculiar circumstances. The cause was tried at the sittings at *Guildhall* after *Hilary* term, 1845. There being two issues, one upon not guilty, the other upon a plea of justification, the late lord chief justice ruled that there was no evidence to affect the defendant *Norman*, and therefore that he was entitled to a verdict on not guilty. It was then objected on the part of the plaintiffs, that the justification was not made out in terms; the defendants not having given any evidence of the judgment or of the *ca. sa.* His lordship, however,

(a) 4 Bingham 8., 12 J. B. Moore, 201.

(b) 1 B. & P. 32. Acc. *Davenport v. Tyrrel*, 1 W. Bla. 75. But in *Sir W. Hankford's case*, P. 3 H. 4, fo. 14, pl. 3, the defendant moved in rest of judgment, upon a bill

of exceptions sealed, by *Hill, J.*, at nisi prius, which was shewn in court. So, in *Enfield v. Hall*, *ut supra*, p. 803, n. (a). And see the opinion of *Fitzjames, C. J.*, in *Jordan's case*, M. 27 H. 8, fo. 25, misabridged *Bro. Repleder*, pl. 1.



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held that no evidence was necessary ; the judgment and writ being admitted on the record. The plaintiffs thought fit to except to that ruling ; the note of the grounds of objection being, that the defendants had given no evidence of the judgment and execution, and also that there was evidence to fix the defendant *Norman*. A party who tenders a bill of exceptions is bound to prosecute it with reasonable diligence ; though the court is always ready to afford every fair indulgence where there has been no laches. The cause having been tried in *February*, 1845, the bill of exceptions remained unsealed down to the time of the death of my late valued and lamented predecessor, which took place early in *July*, 1846. The law having provided no remedy for the case of the chief justice dying without having sealed a bill of exceptions, we thought we had no power to restore the plaintiffs to their former position in this respect. Upon moving for the rule, it appearing that no issue had been taken upon the judgment and writ, that point was given up. But it was insisted that there was evidence to fix the defendant *Norman* on not guilty. The court granted the rule, in order to see whether that statement was borne out by the notes of the chief justice. Having read them, we are satisfied that there is an entire absence of evidence to affect *Norman*. It is now said that there being a plea of justification, by *Norman*, as well as by the other defendants, the verdict (a) for all the defendants upon that issue is inconsistent with the verdict for *Norman* on not guilty. That may be so. It may be that there was no evidence to entitle *Norman* to a verdict on the justification. Supposing the late chief justice had lived to complete the bill of exceptions, the exception founded on the absence of evidence of the

(a) This *verdict* established nothing but the existence of the facts which constituted the *residuum causæ* : the committing

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judgment and *ca. sa.* must, for the reason already stated, have failed. Our attention must, therefore, be now confined to that part of the record which contains the plea of not guilty. If the plaintiffs had thought the verdict on that issue to be wrong, they might have applied in the ensuing term for a new trial. They, however, elected another remedy. Upon reference to the notes, we find no evidence whatever to connect *Norman* with any of the proceedings. We therefore think the ruling of the lord chief justice was quite right, and that there is no ground for granting a new trial.

As to the other point, *May v. Wooding* is a sufficient authority for saying that the rule as to a term's notice, does not apply to proceedings had after verdict.

I therefore think this rule must be discharged.

MAULE, J. I am of the same opinion. The first branch of the rule asks for a new trial as upon a verdict against evidence. On the motion, we thought that the circumstance of the plaintiffs having lost the benefit of their bill of exceptions by the death of the chief justice, afforded ground for allowing them to move for a new trial, notwithstanding the lapse of the time ordinarily given by the practice of the court. Upon the notes, we are satisfied that there was no evidence to go to the jury against *Norman* on not guilty, and therefore this part of the motion fails.

With respect to the alleged necessity for a term's notice, the case of *May v. Wooding* appears to me to be conclusive.

CRESSWELL, J. I am of the same opinion. This motion for a new trial is in substitution of the bill of exceptions, which became abortive by reason of the lamented death of the late lord chief justice of this court, before it could be perfected. To relieve the



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plaintiffs from the difficulty they were thus placed in, the rule was granted in its present form. Of course, the plaintiffs could only upon this rule avail themselves of the objections raised by the bill of exceptions. One of those was disposed of when the rule was moved for, by a reference to the record. The other was, that there was evidence to go to the jury to fix the defendant *Norman* on not guilty. Upon reading the notes, I am satisfied that there was not.

Upon the other point, I agree with my lord and my brother *Maule*.

WILLIAMS, J., concurred.

Rule discharged, with costs. (a)

(a) See *Skinfield v. Lanton*, 4 M. & Scott, 187., where it was held that the rule requiring a term's notice prior to proceedings being taken, where the cause has been at issue more

than four terms, and no proceeding taken in the mean time, does not apply to proceedings taken on the part of the defendant.

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DAVIES, Demandant ; LOWNDES, Tenant.

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Upon an application to change the attorney, where the client is unacquainted with the English language, the affidavits must clearly shew that the purport and object of the motion are known to and sanctioned by the client.

THIS was a writ of right, which, for a third time, came on for trial at the bar of this court on the 17th of *December* last, when, by consent of counsel for the respective parties, a verdict was taken and judgment thereupon entered up for the tenant; the tenant, by the like consent, entering into a rule for payment "to Mr. G. W. F. Cook, the said demandant's present

It is no objection to such an application, that it is made after final judgment.



attorney on record," of the sum of 5000*l.* within a month.

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*Manning*, Serjt., on the first day of this term, obtained a rule calling upon *Cook* to shew cause why one *John Richards* should not be substituted for *Cook* as the demandant's attorney in this cause. The affidavit on which the motion was founded — that of one *Thomas Mendus*, of *St. Dogmell's*, in the county of *Pembroke* — stated that "he knows *Elizabeth Davies*, the demandant in this cause; that she is a native of the principality of *Wales*, and speaks the Welch language, but is unable to speak or understand the English language, and is an uneducated person, and unable to write; that he, the deponent, is also a native of the said principality of *Wales*, and is well acquainted with the Welch and English languages; that he hath lately, at her request, accompanied her several times to the office of *John Richards*, one of the attorneys of this court, and also a native of the said principality of *Wales*, and acquainted with the Welch language; and that she hath, in the deponent's presence and hearing, at those times, instructed the said *John Richards* to act as her attorney in this cause instead of *Cook*, who, as the deponent has been informed and believes, hath for some time past been acting as her attorney therein; that the paper-writing now shewn to the deponent at the time of deposing hereto, and marked with the letter M., a true copy whereof is hereunto annexed, was signed by the said *Elizabeth Davies* in the presence of the deponent, by her making a cross by way of her mark thereon; that, previously to her signing the said paper-writing as aforesaid, the said *John Richards* did, in the deponent's presence and hearing, explain to the said *Elizabeth Davies*, in the Welch language, the purport and meaning of the contents of the said paper writing,



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and, at the request of the said *John Richards*, he, the deponent, immediately afterwards, and before she so signed as aforesaid, did also explain to her, in the Welch language, the purport and meaning of the contents of the said paper writing; and the deponent verily believes, and hath no doubt, that she fully understood the purport and meaning thereof; and that the names ‘*Thomas Mendus*’ set and subscribed to the said paper writing as a witness thereto, are the names and of the proper handwriting of the deponent.”

The paper writing annexed to the affidavit was as follows : —

“*Mr. Richards.*

“*Myself against Lowndes.*

“I request and authorise you to take the necessary proceedings to procure yourself to be attorney in this cause on behalf of me, *Elizabeth Davies*, the demandant: and, for so doing, this shall be your sufficient authority. Dated, &c.

“Witness,  
“*Thomas Mendus.*”

“The × mark of  
“*Elizabeth Davies.*”

*Byles*, Serjt., and *Manisty*, now shewed cause, upon two affidavits by *Cook*, and one by *William Edwards*, his clerk. *Cook*, in his affidavit, stated, that he agreed to the compromise above mentioned upon the recommendation of the demandant’s counsel, who advised that her claim could never be established; that, since the day of the trial, he had been most anxious to see *Mrs. Davies*, and had used his utmost endeavours to obtain an interview with her, but without success, owing to the interference, as the deponent believed, of *Thomas Mendus* and one *John Bowen*, or one of them; that the deponent verily believed that the application to get *Richards* appointed attorney in this cause in the stead of him the deponent, was made at the instance of *Mendus* and



*Bowen*, or one of them, with the view of taking some proceeding to get rid of the arrangement so as aforesaid entered into; that the said arrangement was entered into *bonâ fide*, and without any other view or object, so far as the deponent was concerned, than to do the best he could for his client, the said *Elizabeth Davies*; that, since the trial, the said *Elizabeth Davies* had been very much in the company of *Mendus* and *Bowen*, and he verily believed that she was entirely under their influence and control; that he, on the 14th instant, called at the office of the commissioners for stamps and taxes, in *Somerset House*, and there inquired of the officer by whom attorneys' certificates are issued, whether one *John Richards*, of &c., had taken out his certificate as an attorney or solicitor for the current year, whereupon the said officer made a search, and informed the deponent that the said *John Richards* had not taken out, neither had any person of the name of *John Richards*, an attorney or solicitor's certificate for this year; and that the deponent verily believed that the said *John Richards* mentioned in the affidavit of *Mendus* (on which this rule was obtained), was not, when the rule was granted, and is not now, a certificated attorney.

*Edwards*, in his affidavit, stated, that he did, on or about the 17th of *December* last, at the request of *Cook*, the attorney for the demandant, go to *Carmarthen*, in *South Wales*, for the purpose of seeing Mrs. *Davies*, and one *John Bowen*, who professed to act as agent for her; that he saw *Bowen* at *Carmarthen* on the 18th, and then requested him to go to the demandant's residence, and tell her that the deponent required to see her, but that *Bowen* refused to comply with such request until after several days' delay and intreaty, when he proceeded, as the deponent was informed and believed, to *Aberporth*, in the county of *Cardigan*, where the demandant resided, and returned with her to *Carmarthen*; that Mrs. *Davies*

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(who appeared to be wholly unacquainted with the English language) was informed by *Bowen*, at *Carmarthen* aforesaid, in the presence of the deponent (who has a knowledge of the Welch language) in the Welch language, that the above action was at an end, whereupon she, in the Welch language, said she was happy to hear that the matter was settled; that, prior to *Bowen*, Mrs. *Davies*, and the deponent leaving *Carmarthen* for *London*, *Bowen* proposed to the deponent, that, when they arrived in *Gloucester*, the deponent should prepare some document in writing, which Mrs. *Davies* might execute, and thereby assign the whole of her interest in the cause to him, *Bowen*; that *Bowen* told the deponent that Mrs. *Davies* would sign any instrument he thought proper, and that it was his intention to keep her out of the way, in order that he might get the money agreed to be accepted by way of compromise of the above-named cause into his own hands; that the deponent came from *Carmarthen* to *London* in company with *Bowen* and Mrs. *Davies*, and arrived in *London* on or about the 23rd of *December*, since which time he had never seen Mrs. *Davies*, but that *Bowen* had, within the last three weeks, stated to the deponent that Mrs. *Davies* was living in his house, No. 3. *New Inn Yard*, *Shoreditch*, and that subsequently *Bowen* informed the deponent that he had caused her to be removed from *New Inn Yard* aforesaid; that *Bowen*, although repeatedly requested, in the deponent's presence, by *Cook*, to produce Mrs. *Davies*, to enable him, through the medium of an interpreter, to explain to her her rights, refused to do so; that *Bowen* told the deponent, before leaving *Carmarthen*, that he, upon the faith that the cause had been compromised for a large sum of money, either had given, or would give, instructions to some agent at or near *Aberporth*, to purchase or bid for an estate in that neighbourhood, which was then shortly



to be sold by public auction; and that the deponent, for the reasons aforesaid, verily believed that the object of *Bowen*, in keeping Mrs. *Davies* out of the way as aforesaid, was, to possess himself of all moneys to which she was or might become entitled, in any way arising out of the cause.

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This application is founded upon the single affidavit of *Thomas Mendus*: neither the demandant herself, nor *Bowen*, her accredited agent, nor *Richards*, the proposed new attorney, makes any affidavit. This rule is open to three objections — first, that there is much reason to believe that this is not the *bonâ fide* application of the demandant herself, but of *Bowen* — secondly, that, this being a real action, not within the statute of *Gloucester* (a), the suit was finally determined by the compromise, and therefore the motion, to change the attorney, is irregular and superfluous — thirdly, that the attorney sought to be substituted is not certificated.

1. The affidavit of *Mendus* is by no means satisfactory. It does not shew with sufficient certainty that Mrs. *Davies* understood the purport of the authority addressed to *Richards*; it merely states the conclusion of the deponent: and the paper itself does not even purport to express her desire to dispense with the services of her present attorney. [*Maule*, J. The affidavit certainly does not very distinctly bring home to the demandant the nature and object of the application.]

2. The application is unnecessary. Generally speaking, the authority of the attorney on the record determines with the judgment; and it is competent to the plaintiff to sue out execution by another attorney, without any order to change: *Tipping v. Johnson*. (b) And in *Doe dem. Bloomer v. Bransom* (c), it was held that a rule nisi for a new trial obtained and served by an at-

(a) 6 Ed. 1. c. 1.

(c) 6 Dowl. P. C. 490.

(b) 2 B. &amp; P. 357.



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torney different from the attorney on record, without an order to change, cannot be treated as a nullity. So, the demandant might, without an order to change, proceed upon the rule for payment of the 5000*l.* by a new attorney, under the stat. 1 & 2 *Vict. c. 110. s. 18.* In short, there is no application that could be made in the present state of the cause, to which it could be objected that there had been no rule to change the attorney. [*Maule, J.* Could a motion to set aside a judgment for irregularity be made without changing the attorney? *Wilde, C. J.* Assuming all you urge to be correct, how does that shew that the attorney may not be changed?] It shews that a rule or order for that purpose would at least be superfluous. [*Wilde, C. J.* If the demandant chooses to object that the compromise was made without authority, could she not appoint another attorney for the purpose of making an application to the court to set it aside? *Maule, J.* The judgment is for the tenant. But there is a rule still pending *in the cause*, for payment of the 5000*l.* to the demandant.] The rule directs the money to be paid to the attorney *eo nomine.* [*Wilde, C. J.* The payment of the money to *Cook* is intercepted by a rule granted yesterday at the instance of *Clarke*, one of the former attorneys in the cause.]

3. The attorney sought by this rule to be substituted for *Cook* is uncertificated. He, therefore, can have no right to come and ask the court to enable him to do that which would be illegal, and would subject him to penalties. [*Maule, J.* Would not his acts be valid, though he might subject himself to penalties? *Manning, Serjt.*, produced Mr. *Richards's* certificate. *Wilde, C. J.* The only point to be considered, is, whether it is sufficiently shewn that this is really and *bonâ fide* the application of Mrs. *Davies* herself.]

*Manning, Serjt.*, in support of the rule. Assuming that the cause had reached its termination, which it



clearly had not, there could be no valid objection to this motion; for anything anterior to the judgment, it would still be necessary that the application should be made by the attorney on the record, or by an attorney properly substituted for him. The very object of the party may be to control the rule of the 17th of *December*. [*Wilde, C. J.* The court wishes you to confine yourself to the point already intimated. We felt a difficulty as to the sufficiency of the affidavit, when the rule was granted. It does not seem to us to shew that the demandant properly understood the nature of the application.] The affidavit states that it was properly explained to her by the deponent in her own language, and that she appeared fully to understand the nature and effect of it. If there be any doubt about the fact, it might be referred to the master.

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WILDE, C. J. If the court could satisfactorily see its way to the conclusion that this is really the application of the demandant herself, but little difficulty would be felt as to the other parts of the case. Whether or not she could take any new step by another attorney without an order to change, it is unnecessary to consider. It appears that she is a native of *Wales*, a very illiterate person, and wholly unacquainted with the English language. When this rule was moved for, doubts were entertained by the court as to the sufficiency of the affidavit upon which it was founded: and the observations then made are confirmed by the cause shewn to-day, which materially tends to increase those doubts. *Mendus* might believe that Mrs. *Davies* understood the purport and meaning of the document she signed: nevertheless, he might be mistaken; and he does not give the court the means of ascertaining satisfactorily that she did understand it. The affidavit states that Mrs. *Davies* instructed *Richards* to act as



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her attorney in this cause instead of *Cook*. But the written authority annexed to the affidavit does not support that statement. Possibly she might have intended that *Richards* should be retained to take any future steps in the cause that might be requisite, but not that *Cook* should be interfered with, or displaced, as to any thing that had already been done. It is not suggested that *Cook* has in any way abused the confidence of his client. He opposes this motion on the ground that it is his duty, before he relinquishes his trust, to see that the application is made with her knowledge and approbation. He swears that he believes *Bowen* to be the moving party; and that application has been made to *Bowen* to permit him to communicate with Mrs. *Davies*; but that she is concealed by *Bowen*. The appointment of *Richards*, therefore, being in a language unknown to the client, there being no affidavit by her, no affidavit by any one shewing that this application is made with her knowledge and sanction, and it being sworn that she is concealed from her former attorney, — looking to her interest alone, I think we cannot say that it appears with such certainty that this is her application as to warrant us in removing *Cook*, and substituting for him another attorney, who may exercise the power he would thus acquire, to *Cook's* prejudice.

This decision, however, must be without prejudice to another application founded upon affidavits distinctly shewing that the demandant really does know and approve of it.

MAULE, J. I also think that this rule must be discharged. One ground of opposition to the rule is, that there cannot be a change of attorneys in this stage of the cause — after final judgment. It is contended that such a change is unnecessary, seeing that any subsequent step may be taken by another attorney, without



any such rule. It does not, however, necessarily follow, that, because a rule is unnecessary, it must be refused. I am inclined to think that an application of this kind may, under ordinary circumstances, be made notwithstanding the present position of the cause. It is unnecessary to determine that point: and, as no decision in point has been found, it will be more convenient not to determine it on this occasion. The ground stated by the lord chief justice is quite sufficient to dispose of this rule, viz., that it is not shewn with an adequate degree of precision that this is in reality the application of the demandant herself. No affidavit is made by her: nor is there any affidavit presenting to the court any expressions used by her on any occasion. All that is brought before us is a representation by *Mendus* of the sense in which he understood the conversation that passed between Mrs. *Davies* and *Richards*, and of his belief of the sense in which she understood the document to which she has affixed her mark. There could be no good reason for not procuring the affidavit of the demandant herself: and, if she had made an affidavit, the commissioner, or other person before whom it was sworn, must have certified that the contents of the affidavit had been first read and explained to her in her own language, and that she appeared to understand it. Here, the application is of a nature that must necessarily be quite foreign to her understanding; and there is no affidavit or certificate that she did understand the nature and object of it. There may have been a reason for not taking her before a commissioner. It may very well be that the deponent might believe what he has sworn to, and yet the demandant might have had no intention to deprive *Cook* of the authority given to him by his position of attorney on the record. The written authority, which is deliberately written by a member of the profession, who wishes to be appointed attorney for

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the demandant in lieu of *Cook*, makes no mention whatever of *Cook*: it is a mere expression of a wish on her part that *Richards* shall be her attorney in the cause; and the affidavit of *Mendus* states that he explained to her, in the Welch language, the purport and meaning of the contents of the paper, and that he believes that she fully understood the same. All this may be perfectly false, and yet it might not be practicable to assign perjury on it. It may also be that *Mendus* is mistaken: his wishes may be the parent of his belief. The application is thus made under circumstances of great suspicion. When the rule was moved for, I intimated to my brother *Manning* a strong opinion that the materials were insufficient; and his attention was pointedly called to the propriety of having an affidavit from the demandant herself. He has not, however, thought it necessary to adopt the suggestion. Upon further consideration of the matter, I am clearly of opinion that there was no foundation for the rule upon the original affidavit. But, when we have in answer the affidavit of *Cook*, that Mrs. *Davies* is under the influence of *Mendus* and *Bowen*, or one of them, and that he is refused access to her for the purpose of ascertaining her wishes upon the subject, the suspicion created by the defective materials presented in support of the motion, is most materially strengthened.

CRESSWELL, J. I am of the same opinion. The affidavit upon which this rule was obtained, is, I think, open to all the observations that have been made upon it. In the first place, the written authority is given in a language unknown to the demandant; and the affidavit merely states that the deponent explained to her its purport and meaning, and that he believes she fully understood it. In the case of an affidavit made by a marksman, the person who administers the oath certifies in the jurat that the affidavit was read over to the



deponent, and that he appeared fully to understand it (a): the affidavit of a by-stander that he appeared to understand it, would not be received. There is here also this additional difficulty, that the precise words of the conversation between the deponent and Mrs. *Davies* and *Richards* are not given. Standing upon the affidavit of *Mendus* alone, therefore, I should hesitate to come to the conclusion that this is really the application of Mrs. *Davies* herself. The affidavits filed in answer put the matter beyond all doubt.

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V. WILLIAMS, J., having been counsel in the cause in all its stages, declined to give any opinion.

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Rule discharged.

*Manning*, Serjt., on the 19th instant, again obtained a similar rule, upon the affidavit of the demandant herself, and that of one *William Jones*, an attorney of this court.

The demandant in her affidavit stated “that she did, on the 18th of *January* instant, affix her mark by way of signature to an authority and request in writing, in the Welch language, and to a translation thereof in the English language, addressed to Mr. *John Richards*, one of the attorneys of this court, authorising and requesting him to take the necessary proceedings, on the behalf and in the name of the demandant, for the removal of Mr. *G. W. F. Cook* from being her attorney in this action, and for procuring himself, the said *John Richards*, to be substituted as the attorney of the demandant in this action, instead of the said *G. W. F. Cook*.” The jurat was as follows: — “Sworn in court at *Westminster*

(a) See *R. E.* 31 G. 3. Q. B. P. C. 599. See also *Rex v. 4 T. R.* 284.; *R. T.* 1 G. 4. *The Sheriff of Middlesex*, in *Exch.* And see 1 *Chitt. R.* 660., *Disney v. Anthony*, 4 *Dowl. Haynes v. Powell*, 3 *Dowl. P. C.* 765.



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*Hall*, in the county of *Middlesex*, this 18th day of *January*, 1847, by the deponent, the contents of the affidavit having been first read and explained to her in the Welch language, (a) by *William Jones*, of &c., who was first sworn duly to interpret the same." (b)

The authority referred to in the above affidavit (of which there were two copies, the one in the English, the other in the Welch language, to both of which the demandant's mark was affixed,) was as follows, and was witnessed by *Jones* : —

" Mr. *John Richards*.

" Myself against *Lowndes*.

" Sir, — I authorise and request you to take the necessary proceedings, on my behalf, and in my name, for the removal of Mr. *G. W. F. Cook* from being my attorney in this action, and for procuring yourself to be substituted as my attorney in this action instead of the said *G. W. F. Cook*. Dated," &c.

*Jones's* affidavit stated, that he was well acquainted with the Welch and English languages, and that the paper-writing marked *A.* was a correct translation of the paper-writing marked *B.*, and that he distinctly explained to the demandant in the Welch language the contents of the affidavit marked *C.*, before the swearing thereof by her, when she said to the deponent that she understood the purport and contents, and fully approved thereof; and that he, at the same time, distinctly explained to her the contents of the said paper-writing marked *A.*, and read and explained to her the contents of the said paper-writing marked *B.*, when she said that she understood the purport and contents of the said several paper-writings, and fully approved thereof; that the demandant thereupon signed the said two paper-

(a) See *Archb. Pract.* 7th edit. 1214.

(b) *Vide post*, p. 823., n.(a)



writings marked respectively *A.* and *B.*, by affixing her mark thereto respectively, in the presence of the deponent; that the name "*William Jones*" respectively subscribed to the said paper-writings respectively marked *A.* and *B.*, as the witness attesting the signature thereof respectively by the demandant, were the names, and of the proper handwriting, of the deponent; and that the demandant did, on the said 18th of *January* instant, state to the deponent that it was her wish and intention that *Cook* in the said paper-writings named, should be removed from being her attorney in this action, and that *Richards* should be substituted as her attorney in this action instead of *Cook*, and that it was with the view of having *Cook* removed from being her said attorney, and having *Richards* substituted as her attorney in his stead, that she had so signed the said paper-writings respectively marked *A.* and *B.* as aforesaid.

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*C. Jones*, Serjt., now shewed cause. The demandant is not described in her affidavit, in conformity with the rule of *H. T. 2 W. 4. (a)* In *Lawson v. Case (b)* it was held that an affidavit made by a defendant in a cause could not be read, unless his addition was inserted therein. And, although, in the subsequent case of *Jackson v. Chard (c)*, it was held, that, where the defendant makes the affidavit, his addition need *not* be given, the propriety of that decision was much doubted in *Brooks v. Farlar. (d)* [*Maule, J.* In *Archbold (e)*, *Lawson v. Case* is said to be a solitary case, and evidently wrong.]

(a) Which requires that "the addition of every person making an affidavit shall be inserted therein." See 8 *Bingh.* 289., 1 *M. & Scott*, 416., 3 *B. & Ad.* 375., 2 *C. & J.* 169., 2 *Tyrwh.* 341., 4 *Bligh, N. S.* 593., 1 *Dowl. P. C.* 184.

(b) 1 *C. & M.* 481., 3 *Tyrwh.* 489., 2 *Dowl. P. C.* 40.

(c) 2 *Dowl. P. C.* 469.

(d) 3 *Scott*, 654.

(e) *Archb. Pr.* 7th edit.



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The affidavit of the demandant being that of a person unacquainted with the English language, and a *marks-woman*, the jurat ought to shew that it was explained to her at the time of swearing, and that she understood it. [Maule, J. Would that which you suggest be necessary in the case of an affidavit made by a Frenchman? It does not seem to supply the defect of literature.] By rule of court, of 31 G. 3. (a), it is provided, that, “when any affidavit is taken by any commissioner of the King’s Bench, made by any person who, from his signature, appears to be illiterate, the commissioner shall certify or state in the jurat that the affidavit was read in his presence to the party making the same, and that such party seemed perfectly to understand it; and also that the said party wrote his signature in the presence of the commissioner.” So, by rule of the court of Exchequer, *Hilary* term, 40 G. 3. (b), “it must be certified ‘in the jurat of affidavits made in the Exchequer by illiterate persons, that the deponents understood the affidavits, and made them in the presence of the commissioner taking the same.’” [Maule, J. These rules apply to affidavits taken by commissioners, not to those made in court (c).] It would seem to be otherwise, from the rule of *Trinity* term, 1 G. 4. Exch. (d), which requires the jurat to state that the affidavit was read to, and understood by, the deponent, in the presence of *the officer of the court* (e), or person administering the oath. And in *Haynes v. Powell* (g) it was held, that, if an illiterate person is sworn in court, or before a commissioner, the

(a) 7 T. R. 82.

(b) 8 Price, 504.

(c) Archb. Pr. 1214.

(d) 8 Price, 501.

(e) An affidavit of a marksman, which expresses in the jurat that A. B. had been first sworn to the fact that he had

read over and explained the affidavit to the marksman, and that he understood it, is insufficient; the officer himself ought to explain it. *Rex v. Anthony*, 4 Dowl. P. C. 765.

(g) 3 Dowl. P. C. 599.



fact of the affidavit being read over to him, and his understanding it, must be stated in the jurat. The court must be satisfied that the party is duly sworn. [*Maule, J.* The court is satisfied (a).]

The affidavits do not by any means shew that this is really the application of the demandant herself.

*Manning, Serjt.*, in support of the rule, was not called upon.

*Per curiam.* We think it now sufficiently appears that the application to substitute *Richards* as the attorney in this cause in lieu of *Cook*, is made with the knowledge and under the sanction of the demandant, and therefore that this rule should be made absolute, saving any lien that *Cook* may justly have for costs due to him.

Rule absolute accordingly.

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*Scott*, on behalf of *Henry Clarke*, one of the former attorneys for the demandant in this cause, on the 15th instant, obtained a rule calling upon the demandant and tenant respectively, upon notice of that rule to be given to their respective attorneys (b), to shew cause why it should not be referred to one of the masters to ascertain the amount of the lien, if any, of *Clarke*, upon the sum of 5000*l.* agreed by the rule of court of the 17th of

The lien of an attorney attaches upon money received by way of compromise; though the verdict and judgment be against his client.

Upon an application to give effect to such lien, the affidavit should shew the amount claimed by the attorney.

(a) The jurat was signed by *W. Williams, J.*, who personally satisfied himself that the affidavit was properly explained to, and the nature of the application understood and approved by the demandant.

(a) The service of the rule upon *Cook*, who did not appear in opposition thereto, was held sufficient to call upon him for an answer.



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The affidavit upon which the motion was founded, stated that *Clarke*, was on the 22nd of *October, 1844*, duly retained as the attorney for the demandant in this cause, in the place of Messrs. *Davies & Son*, who had for some time had the conduct of the suit; that *Clarke* continued to act as the attorney for the demandant down to the 18th of *March, 1846*, when the following order was made by *Cresswell, J.*:—" *Davies v. Lownder*. By consent of Mr. *Henry Clarke*, I do order that Mr. *Gustard* be appointed attorney for the demandant herein, instead of the said Mr. *Clarke*, without prejudice to the said Mr. *Clarke's* lien for costs, &c.;" that, after the cause had been compromised, *Clarke* applied to *Cook* for an undertaking to pay his costs out of the 5000*l.*, which *Cook* declined to give; and that *Clarke* had made out and duly delivered his bill of costs, charges, and disbursements, to the demandant.

Jan. 29. Against this rule cause was now shewn by *Martin*, and *Channell*, Serjt., on behalf of the tenant, and by *Manning*, Serjt., on behalf of the demandant. The opposition of the latter was founded upon the affidavits of *John Bowen* and of *Cook*.



*Bowen*, in his affidavit, stated, that, upon the order being made for substituting *Gustard* as the demandant's attorney in lieu of *Clarke* (the 13th of *March*, 1846), the latter applied to *Bowen*, as agent of the demandant, to accept in his favour, in the demandant's name, two bills, dated that day, one for 1000*l.*, the other for 1778*l.* 4*s.* 4*d.*, payable two months after date; that *Bowen* accepted the bills under the power of attorney held by him (dated the 7th of *March*, 1846), and delivered them to *Clarke*; that it was agreed between *Bowen*, as such agent, and *Clarke*, that they (the bills) should be taken and accepted by *Clarke* in satisfaction of all claims of *Clarke* upon the demandant for or in respect of his costs, charges, expenses, and disbursements as attorney in this cause; and that the two bills so taken and accepted by *Clarke*, were still retained by him.

*Cook*, in his affidavit, stated, that he was appointed attorney for the demandant by a judge's order, dated the 28th of *October*, 1846; that he afterwards received the bulk of the papers in the cause from Messrs. *Davies & Son*; that he received other papers from *Gustard*; that he never received any papers from *Clarke*, nor had he any notice of *Clarke's* lien when he received the papers from *Davies & Son* and *Gustard*; that he had no notice of *Clarke's* lien until the 17th of *December*, 1846, after the cause had been compromised; that one *Scott*, a client of *Clarke's*, informed him (*Cook*) that he (*Scott*) had paid *Clarke* all his actual expenses in the cause, receiving bills from *Bowen* at the rate of 500*l.* for every 100*l.* advanced: that *Clarke* had informed the deponent to the same effect; and that it was his intention to obtain his full costs, in order to repay *Scott*; that the payment of the 5000*l.* into court would be injurious to the demandant, by reason of the delay, and the possibility of other liens being sought to be attached to it; that the deponent had laid out large sums in conducting the cause; that

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he had not yet made out his bill, and was therefore unable to state the amount, but believed it would considerably exceed 1000*l.* (a).

*Martin*, and *Channell*, Serjt. By the rule of the 17th of *December*, 1846, the tenant, for whom a verdict was found by the grand assize, is ordered to pay 5000*l.*, to *Cook*, the demandant's attorney, within a month. Since that rule was made, claims have been made on behalf of five different parties, viz. *Gustard*, *Davies* and Son, *Clarke*, and *Cook*, who had, at various times, acted as attorneys for the demandant in the cause, and *Richards*, her present attorney. The tenant is ready to pay the money into court, or to dispose of it in any way the court may direct. [*Wilde*, C. J. The order to pay the money to the attorney is, *primâ facie*, an order to pay it to the demandant. At the present moment, all we have to deal with is the application of Mr. *Clarke* that his lien may have effect.]

*Manning*, Serjt., for the demandant. *Clarke's* lien never attached to the fund in question ; and, if he ever had a lien, he has lost it by receiving negotiable securities in satisfaction of his demand. The 5000*l.* is not a sum recovered in the cause. It is a mere bonus or gratuity given by the tenant, who has obtained a verdict in the cause, to the demandant : and the mere circumstance of the payment being secured by a rule of court does not in any degree alter the character of the transaction. [*Maule*, J. The lien of the attorney arises out of an *implied* contract. If the parties had entered into a *special* contract, the attorney would of course have stipulated for payment of his costs out of any fund that

(a) This affidavit had been made by *Cook* whilst he was attorney in the cause, and was now used by *Richards*, the substituted attorney.



might be realized, whether by a verdict and judgment or by a compromise. The honesty of the case certainly is, that the attorney's lien should attach upon money that is the fruit of his labour and skill, more particularly where he has taken up the cause of a poor person.

At all events, the lien is destroyed by the taking of security: *Cowell v. Simpson*. (a) Lord *Eldon* there says: "Looking through the general doctrine of lien as applicable to all cases except the purchase of an estate, with reference to which it has in a series of decisions been extended, it may be described as *primâ facie* a right accompanying the implied contract. In the case of a factor, who has a lien both for his expenditure upon the goods in his possession and his general balance upon former transactions, entering into a special contract for a particular mode of payment, he loses his lien." And in *Chase v. Westmore* (b), Lord *Ellenborough* says: "In *Cowell v. Simpson*, the lord chancellor considers a lien as a right accompanying an implied contract; and, in one passage of his judgment, he is reported to have said — 'If the possession commences under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing, the one contract destroys the other:' but it is evident, from other parts of the report, that the lord chancellor was there speaking of a special contract for a particular mode of payment. Such a contract is apparently inconsistent with a right to detain the possession; and, consequently, will defeat a claim to the exercise of such a right. And we agree, that, where the parties contract for a particular time or mode of payment, the workman has not a right to set up a claim to the possession inconsistent with the terms of his contract." [*Maule, J.* Does *Bowen* state that the bills are paid?] He does not: he merely states that they

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(a) 16 Ves. 275.

(b) 5 M. &amp; S. 180.



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are still retained by *Clarke*. [*Wilde*, C. J. They are long over-due: of course, they are unpaid.] A ship-owner taking bills for freight, loses his lien. [*Wilde*, C. J. A landlord does not lose his right to distrain for arrears of rent, by taking a bill or note for the amount(a).] The right of distress is the higher security, and therefore does not merge in the lesser. [*Cresswell*, J., referred to *Dixon v. Yates*.(b) There, *D.* bought of *Y.* forty-six puncheons of rum lying in the warehouse of *Y.* at *Liverpool*, and sold them to *C.*, who was a clerk of *Y.*, but carried on business for himself. *D.* gave *C.* an invoice, specifying the marks and numbers of each puncheon, and took his acceptances for the price. The rum, and the samples which had been taken, remained in *Y.*'s warehouse. The invariable mode of delivering goods sold while they are in warehouses at *Liverpool*, is by the vendor's giving a delivery-order to the vendee. *D.* was asked by *C.* for delivery-orders, but declined giving any except for two or three puncheons, which *C.* received. *C.* mark, coopered, and gauged the casks. While the bills were running, *C.* sold twenty-six of the puncheons to *K.*, who paid for them, and who, by *C.*'s permission, without the knowledge of *D.*, gauged and coopered the casks in the warehouse of *Y.*, and marked them with his initials. *C.* gave an invoice to *K.*, stating the marks and numbers of the casks, and by whom the rum was bonded. *C.* also, while the bills were running, sold eighteen puncheons of the rum to two other parties, to whom he gave similar invoices, and samples, and who afterwards obtained three of the puncheons, on a delivery order signed by themselves, but not by *D.* They paid *C.* for the whole. The bills given by *C.* for the price of the forty-four pun-

(a) See *Harris v. Shipway*, 3 *M.* 462.; *Palfrey v. Baker*, 3 *Price*, 572.  
*Bull*, N. P. 182.; *Davis v. Gyde*, 2 *Ad. & E.* 623., 4 *N.*  
 (b) 5 *B. & Ad.* 313., 2 *N.* & *M.* 177.



*cheons, were dishonoured.* And it was held, upon a special case,—whereby it was agreed that the court should be at liberty to draw from the facts any inference that the jury might have drawn,—that *C.* never had acquired the actual possession of the rum, and, *on his dishonouring his acceptances, D. had a lien on it for the price*; and that *C.*'s sub-vendees could not claim against *D.* the rum which remained undelivered to them. *Wilde, C. J.* The order for changing the attorney,—which is dated on the day the two bills are alleged to have been drawn and accepted,—expressly reserves the lien of *Clarke*. That seems to negative the inference drawn by *Bowen*.] The order would, of course, be drawn up in the ordinary form. [*Wilde, C. J.* This order is not in the usual form; the usual order provides for *payment* of the attorney's bill.]

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*Scott*, in support of his rule, relied on *Stevenson v. Blakelock (a)*, where it was held that the lien of the attorney is not extinguished by his taking acceptances, which are afterwards dishonoured; and where Lord *Ellenborough* observed: "It is unnecessary to canvass the doctrine in *Cowell v. Simpson*, inasmuch as there is a material distinction between that case and the present; for there the bills were running, and there was no reason to presume that they would not be duly paid; in this case, the bills have been refused payment. Assuming, then, the position of the lord chancellor to be correct, here there is the further circumstance of the bills being dishonoured; *which places this defendant in his original situation as to lien.*" [*Wilde, C. J.* We feel no doubt that *Clarke*'s lien attaches upon the fund in question, and we think it is not extinguished by the taking of securities that have turned out to be worth-

(a) 1 M. & S. 535.



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less. We think, however, the affidavit should have shewn the amount of *Clarke's* claim : in this respect it is defective.] It is sworn that the bill has been delivered: the amount cannot be material, seeing that the rule merely asks that effect may be given to *Clarke's* lien, when ascertained by taxation. [*Wilde, C.J.* You ask to have the whole 5000*l.* paid into court. Surely you cannot be entitled to that, when you do not shew that you have a lien to the extent of 5*l.* *Manning, Serjt.*, admitted that the bill had been delivered, and that the amount claimed was 718*l.* 5*s.* 10*d.*]

WILDE, C. J. Let that sum be paid into court by the tenant, there to remain to abide the result of a taxation of *Clarke's* bill, *Clarke* giving credit, on such taxation, for any sums received by him from or on account of the demandant.

Rule absolute accordingly. (a)

(a) See *Anonymous*, 1 Salk. 86., Carth. 412., Skinn. 679., Comb. 439; *Turwin v. Gibson* 3 Atk. 720; *Waldron, In re*, 2 Str. 1126; *Rex v. Smollett*, 3 Burr. 1313; *Wilkins v. Carmichael*, 1 Dougl. 104; *Welsh v. Hole*, 1 Dougl. 238; *Griffin v. Eyles*, 1 H. Bla. 122; *Mitchell v. Oldfield*, 4 T. R. 123; *Read v. Dupper*, 6 T. R. 361; *Hollis v. Claridge*, 4 Taunt. 807; *Cowell v. Betteley*, 10 Bingh. 432., 4 M. & Scott, 265., 2 Dowl. P. C. 780; *Worrall v. Johnson*, 2 Jac. & W. 218; *Colegrave v. Manley*, 1 Turn. & Russ. 400; *Fleury v. The Earl of Meuth*, 1 Alcock & N. 88; *Newton v. Harland*, 2 M. & G. 886., 4 Scott, N. R. 769; *Tidd's Practice*, 9th edit., 337, 338; *Archbold's Practice*, 7th edit., 86, 87.

The rule of the 17th of December, 1846, for payment of the 5000*l.* to *Cook*, was afterwards, in consequence of other claims being set up on the fund, amended by an order of *Maule, J.*, at chambers, made by consent. The amended rule directed "that the tenant do and shall forthwith pay to *Gartard* the sum of 250*l.*, to Messrs *Davies & Son* the sum of 700*l.*; and that he do and shall forthwith pay into court the sum of 1600*l.* to cover the lien claimed by *Cook*, and also the sum of 718*l.* 5*s.* 10*d.* to cover the lien claimed by *Clarke*; and that, out of the said last-mentioned sum, there be paid out of court to *Clarke* the amount of his bill, as soon as the same shall have been ascertained by the master; and



*Martin*, for the tenant, asked for his costs of shewing cause, to be paid out of the fund.

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WILDE, C. J. In right, no costs are given.

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that the tenant shall forthwith pay the residue of the said sum of 5000*l.*, amounting to the sum of 1731*l.* 14*s.* 2*d.*, to the said demandant."

*Cook's* claim was afterwards satisfied by paying him 800*l.*,

and *Clarke's* bill was taxed at about 400*l.* Several other payments having been made in satisfaction of liabilities incurred by the demandant, in the result, she returned to *Wales* with about 500*l.*

### PATER v. BARKER.

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CASE, for words in the nature of slander of title.

The declaration stated that the plaintiff, before and at the time of the committing of the grievances by the defendant thereafter mentioned, was possessed, for the residue of a certain term of years then to come and unexpired, to wit, the term of twenty-one years, of divers, to wit, twelve unfinished houses, with the ap-

In case against a surveyor of highways, appointed under the 7 & 8 Vict. c. 84., for the following words alleged to have been spoken

by him at a public auction, in reference to certain unfinished houses at a place called *Agar Town*, which the plaintiff had put up for sale — "My object in attending this sale is, to inform purchasers, if there be any here present, that I shall not allow purchasers (*meaning persons who then might be disposed to purchase at the said sale the said house of the plaintiff, so exposed for sale as aforesaid*), to be finished or occupied, until the roads are made good in *Agar Town*. I have no power to compel any one to make the roads; but I have power to stop the buildings until the roads are made. If there shall be any purchasers, they will have to keep the carcasses in their unfinished state until the roads are made" — the judge at the trial allowed the declaration to be amended, under the 3 & 4 W. 4. c. 42. s. 23., by substituting for the words in *italic*, the words "the houses:" — Held, that such amendment was properly allowed.

In such a case, malice is not to be inferred from the circumstance of the defendant having acted upon an incorrect view of his duty, founded upon an erroneous construction of the statute.



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purtenances, situate, lying, and being in a certain place called *Agar Town*, wherein divers roads were then marked out and unfinished, which said place then was, and now is, parcel of the parish of *St. Pancras*, in the county of *Middlesex*, and then did and still does form part of a certain division or district for the administration, and within the operation, of an act made and passed in the eighth year of Her Majesty *Victoria*, intituled "An act for regulating the construction and use of buildings in the metropolis and its neighbourhood," called the district of the parish of *St. Pancras*, and which houses then were approached by, and adjoined to, a certain roadway, of the width, quality, and description, required by the said act, that is to say, of such width as would admit to one of the fronts thereof, of a scavenger's cart of the ordinary size of such carts; the said houses then being of the class described in the said act as the first class: that the plaintiff, before and at the time of the committing of the grievances thereafter mentioned, was desirous of selling his said estate and interest in the said houses by public auction, and, for that purpose, the plaintiff, before and at the time of the committing of the said grievances, to wit, on the 2nd of *March*, 1846, caused his said estate and interest therein to be advertised for, and the same were then put up and exposed to, sale by public auction, at a certain house, to wit, the *Camden Arms*, within the said parish and district of *St. Pancras*, by one *James Kennedy*, as the auctioneer and agent of the plaintiff, in order that the same might be then sold for the plaintiff: that, before and at the time of the said putting of the said houses up for sale, the defendant was, and filled the office of, one of the surveyors appointed in pursuance of the said act, for the said district within which the said houses then were so built: yet that the defendant, well knowing the premises, but contriving, and falsely and maliciously intending



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to injure the plaintiff, and to cause and induce the persons attending the said exposure to sale, to believe and apprehend that there was no such roadway to one of the fronts of the said houses, as required by the said act, and to interrupt the said sale, and to hinder and prevent the plaintiff from selling or disposing of his said estate or interest in the same, and to cause the plaintiff to lose and be deprived of divers great gains, which he might, and otherwise would, have reaped and derived from the said sale, and to lose and be deprived of the expenses attending the said exposure to sale, and to which he the plaintiff had then been put in procuring the said estate to be so advertised for and exposed to sale, and to cause the same to be sold for a much smaller price than the said houses otherwise, but for the committing the grievances thereafter mentioned, would have realised and produced, and to vex, harass, and oppress the plaintiff, to wit, on the day and year aforesaid, wrongfully, injuriously, falsely, and maliciously, and without any reasonable or probable cause, and under colour of his said office, and under the false and malicious pretence of executing the same, attended, and was present at, and upon, such exposure to sale of his the plaintiff's said estate and interest of and in the said houses, and at the place aforesaid, and then, upon such exposure to sale, and before the said estate and interest had been put up for sale, falsely and maliciously, under colour and pretence of executing his said office, in the presence and hearing of divers liege subjects of our said lady the Queen, then and there assembled and present, and attending the said sale for the purpose of bidding for, and purchasing, the said houses, spoke and published of and concerning the plaintiff, and of and concerning the said houses with the appurtenances, and the plaintiff's said estate and interest therein, the false, scandalous, slanderous,



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and malicious words following — “ My object (meaning, his the defendant’s object) in attending this sale, is, to inform purchasers, if there be any here present, that I (meaning, the defendant) shall not allow *purchasers* (meaning, persons who then might be disposed to purchase at the said sale the said houses of the plaintiff so exposed for sale as aforesaid,) to be finished or occupied, until the roads are made good in *Agar Town* (meaning, the said district called *Agar Town* aforesaid): I (meaning the said defendant,) have no power to compel any one to make the roads (meaning, the roads in *Agar Town* aforesaid); but I (meaning the defendant) have power to stop the buildings (meaning, that he, the defendant, had power, under and by virtue of his being such district surveyor under the said statute, to prevent the said unfinished houses from being finished,) until the roads (meaning the said roads in *Agar Town* aforesaid,) are made: If there shall be any purchasers (meaning, purchasers of the said houses of the plaintiff at the said sale), they will have to keep the carcasses (meaning the said houses in their then unfinished state,) until the roads (meaning the roads aforesaid) are made.” And the plaintiff further said, that the defendant, further intending as aforesaid, afterwards, to wit, on the day aforesaid, at the place aforesaid, and just before the commencement of the said putting up for sale of the said houses, in the presence and hearing of the said subjects so assembled at the said putting up for sale for the purpose of bidding for and purchasing the said houses, spoke and published the false, malicious, and slanderous words following of and concerning the said houses, with the appurtenances, and the plaintiff’s said estate therein — “ Gentlemen, I am not come here as a purchaser, but to inform the company (meaning, the subjects aforesaid who were then there assembled at the said intended sale,) that the roads



(meaning the roads aforesaid) must be made good, or I will stop the communication with the buildings" (meaning the said houses of the plaintiff): That, by means of the committing of the said several grievances by the defendant as aforesaid, one *John Turner*, &c. &c., and divers other of the said liege subjects of our said lady the Queen, who were so present at, and upon, the said exposure to sale as aforesaid, and who were then about to be, and become, purchasers of the estate and interest of the plaintiff, and who might, and would otherwise, have bid for and purchased the same, were then induced to believe and apprehend that there was no sufficient roadway to one of the fronts of the said houses, as required by the said act; that thereby, and by means of the said several grievances, the said several persons and last-mentioned subjects were deterred and prevented from bidding for, and becoming the purchasers of, the said estate and interest of the plaintiff, and then and from thenceforward had respectively wholly declined to purchase the same; that thereby the plaintiff was then hindered and prevented from selling, and disposing of, his said estate and interest, and had thereby not only lost and been deprived of all the advantages and emoluments which he might and would have derived and acquired from the sale thereof, but had been forced and obliged to pay, lay out, and expend divers large sums of money, to wit, 100*l.*, in and about the said exposure to sale, and the expenses incidental thereto, &c.

The defendant pleaded, first, not guilty; secondly — as to the speaking and publishing such and so many of the words in the declaration mentioned, as alleged and implied that the said roads in *Agar Town* aforesaid were not made good, and that there was no such roadway to one of the fronts of the said houses of the plaintiff as required by the said act of parliament in the declaration mentioned — that, before and at the said

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several times when &c. in the declaration respectively mentioned, the said roads in *Agar Town* aforesaid were not, and had not been, made good, and, in the contrary thereof, were then in a bad and imperfect state, and unfit for use and for the purposes of traffic: and that there was not then any such roadway in one of the said fronts of the said houses, of the width, quality, and description required by the said act of parliament: and that therefore the defendant, so being such surveyor as aforesaid, at the several times when &c. in the declaration respectively mentioned, spoke and published the words in the introductory part of the plea mentioned and referred to, as he lawfully might, for the cause aforesaid — verification.

The plaintiff joined issue on the first plea, and replied *ad minus* to the second.

The cause was tried before *Erle, J.* at the sittings at ~~Westminster~~ after last *Trinity* term. The plaintiff is a solicitor. The defendant is the district surveyor for the district of *St. Pancras*, under the metropolitan-buildings act — *11 & 12 Vict. c. 54*. The plaintiff had acted as agent or agent for a gentleman named *Agar*, who possessed considerable property in the neighbourhood of *Agar Town* which had been laid out for building, and which was known by the name of *Agar Town*. Prior to the passing of the statute above referred to, the plaintiff had built, amongst others, four houses in a street called *Darham Street*, *Agar Town*; and, subsequently to the passing of the act, he commenced the building of eight more, in a place called *Winchester Terrace*: all the houses being of the description called in the act *improved* houses of the first class, and all situated within the district of *St. Pancras*.

About the middle of January, 1846, the plaintiff advertised in said act on the 2nd of March his interest in the four improved houses in *Darham Street*, and in the eight *circumstances* in *Winchester Terrace*.



On the 27th of *February*, the plaintiff received from the defendant the following notice : —

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“ Metropolitan-buildings act,  
“ 7 & 8 *Vict. c. 84. s. 14. sched. (M.)*

“ To Mr. *John Pater*, and to whomsoever else it may concern.

“ I, the undersigned, being the surveyor appointed to the district of the parish of *St. Pancras*, in the county of *Middlesex*, do hereby give you notice that the eight fourth-rate houses now in progress, and belonging to you, situate in *Winchester Terrace, Agar Town*, are not conformable to the statute, in the portions thereof under mentioned ; and I require you, within forty-eight hours from the date hereof, to amend the same. Dated, &c.

(Signed) “ *Henry Baker.*”

“ Irregularities referred to.

“ 1. The ridge-pieces, rafters, and other timbers being placed within three inches of the face, side, and back of the flues, where the substance of brickwork is less than 8<sup>1</sup> inches.

“ 2. The drains not having been properly built and made good.

“ 3. There being no roadway either to the houses, or to the inclosure about them, of such width as will admit, to one of the fronts, of the access of a scavenger's cart.”

On the morning of the 2nd of *March*, just before the sale commenced, the defendant, addressing the persons present in the auction-room, spoke, according to the evidence of the first witness, the following words : —  
“ My object in attending the sale, is, to inform purchasers, if there are any present, that I shall not allow the houses to be finished until the roads are made good. I have no power to compel the purchasers to complete



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the roads ; but I have power to prevent them from completing the houses until the roads are made good." A second witness stated the words to be as follow:—  
 " I came here, not as a buyer, but to tell purchasers, if there be any here, that I will not allow purchases to be completed, till the roads are made good in *Agar Town*." And a third witness, who was the plaintiff's foreman, stated them to be in substance: — " I cannot allow the houses to be finished until the roads are made."

Amendment. It being conceded that the declaration was insensible as it stood, and the learned judge conceiving that it was a case for amendment under the 3 & 4 W. 4. c. 42. s. 23., the declaration was amended by striking out the words in *italic, antè*, p. 834, and substituting "the houses;" leave being reserved to the defendant to move to enter a nonsuit, if the court should think such amendment not warranted by the statute.

In consequence of the defendant's interruption, only two of the houses were sold ; the price they realised being 35*l.* each, whereas, according to the evidence of the auctioneer, they might reasonably have been expected to produce 65*l.* each. The only witness who stated that he was deterred from bidding, was one of the plaintiff's tenants.

On the 7th of *March* (which was two days after the commencement of this action), the following information under the statute was laid against the plaintiff by the defendant: —

" Information. *Pater* ats. *Baker*, D. S.

" Metropolitan-buildings act, 7 & 8 *Vict.* c. 84.

" Information of *Henry Baker*, district surveyor of the parish of *St. Pancras*, against *John Pater*, for irregular building:

" Whereas, *John Pater*, of &c., pursuant to notice duly given to me, the undersigned, and dated the 20th day of *October* now last past, has proceeded to build,



and has built and covered in, eight certain buildings of the fourth rate of the first or dwelling-house class, situate in *Winchester Terrace, Agar Town*, in the said parish, but has not constructed the said buildings, and used the ground on which they stand, according to the provisions and regulations of the 7 & 8 *Vict. c. 84.*, called the Metropolitan-buildings act: And whereas due notice has been served upon the said *John Pater*, a copy of which notice is hereunto annexed, dated the 27th day of *February* now last past: And whereas, after the expiration of such last-mentioned notice, I proceeded to inspect the work, and found that the irregularities complained of had not been wholly amended, particularly as to the want of a roadway to the said houses, as required to be made by schedule (K.) of the said act: Now, I, the surveyor duly appointed to the district of the parish of *St. Pancras*, in the county of *Middlesex*, do hereby give information of such irregular work to the official referees appointed under the said act, and request them to proceed to hear the matter. As witness my hand, this 7th day of *March*, 1846.

(Signed) “*Henry Baker.*”

‘ To the official referees of  
metropolitan buildings.”

On the 16th of *March*; the official referees attended to view the premises. They found that the first objection had been removed by the plaintiff within the forty-eight hours; that the second objection had also been once removed by a trifling alteration in the drains; and, as to the third, they were of opinion that the terms of schedule (K.) had been satisfied by leaving a space of the required width, and that it was not necessary that it should be a completely made road, — or, in the language of their award, which was made on the 28th of *March*, “that, inasmuch as there is at least one roadway

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leading from the *King's Road* up to and along the fronts of the houses in question, which, although rough and unfinished, is of such width as will admit to such houses of the access of a scavenger's cart, the said houses are not, in respect of the roadway thereto, contrary to the said act."

The defendant, who was present when the official referees were viewing the premises, in answer to an inquiry addressed to him by one of the plaintiff's witnesses, as to why he pursued Mr. *Pater*, observed — "I pursue Mr. *Pater* because he is the agent of Mr. *Agar*, the ground-landlord, whom I cannot get at." And, on a subsequent occasion, when remonstrated with for the course he had adopted with regard to Mr. *Pater*, the defendant said: "Then, let him withdraw his action."

On the part of the defendant, it was insisted that malice was the gist of an action of this sort — *Smith v. Spooner* (a) — and that there was no evidence whatever to go to the jury, that what had been done by the defendant, was done with a malicious intention to injure the plaintiff; but that, on the contrary, all the evidence shewed that the defendant was acting in the honest and *bonâ fide* belief, though it might be an erroneous belief, that he was doing no more than it was his duty, under the act, to do.

The learned judge was inclined to think that the mere leaving a space of the required width for a roadway, was not a compliance with the direction contained in schedule (K.). And he left it to the jury to say, whether they thought the defendant had acted in the *bonâ fide* belief that he was pursuing his duty under the statute, or whether they would infer, from his subsequent declarations and conduct, that the course taken

(a) 3 Taunt. 246.



by him with reference to the sale, was dictated by a malicious intention to inflict an injury on the plaintiff.

The jury returned a verdict for the plaintiff, damages 18*l.* 12*s.*, leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that there was no evidence of malice to go to the jury.

*Channell*, Serjt., in *Michaelmas* term last, accordingly obtained a rule nisi to enter a nonsuit, upon the two points reserved. (*a*)

*Keating* and *Dowdeswell* shewed cause. Enough of the words charged were proved, to sustain the action, without reference to the amendment made at the trial. The substance of the slander was, that the plaintiff, in erecting the houses in question, had so conducted himself as to enable the defendant, in the exercise of the powers conferred upon him by the statute 7 & 8 *Vict. c.* 84., to prevent the carcasses being finished; and that was proved. The defendant's objection pointed to the alleged insufficiency of the roadway leading to the houses. The only provision of the act as to roads, is that contained in schedule (K.), which declares that "with regard to every building of the first class, every such building must be built with some roadway, either to it or to the inclosure about it, of such width as will admit to one of its fronts of the access of a scavenger's cart of the ordinary size of such carts." This, in terms, requires, not a perfect *road*, that shall be paved or laid with gravel, or granite, or any other material ordinarily

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(*a*) He also submitted that the defendant was entitled to a notice of action, under *s.* 108. of the 7 & 8 *Vict. c.* 84. Upon this point, however, the rule was not granted, the defendant

not having pleaded not guilty "by statute." See *Neale v. M'Kenzie*, 1 *C. M. & R.* 61., 2 *Dowl. P. C.* 702.; *Fisher v. The Tahmes Junction Railway Company*, 5 *Dowl. P. C.* 773.



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used for making roads; but merely a *roadway*, a space of a given width which may be used as a road. The avowed object of the defendant was, not to cause the particular roadway to be made good, but to apply the screw to the plaintiff, in order to enforce what the defendant thought fit to consider a due construction of all the roads of *Agar Town*. There is no clause of the act giving the defendant the power he assumed to have. [Cresswell, J. Might not the surveyor be very excusable for having mistaken the nature and extent of the powers given to him by this complicated act of parliament?] His mistake has operated a very serious injury to the plaintiff: and the language used by him at the meeting of the official referees, and also when subsequently remonstrated with for his persecution of the plaintiff, clearly shewed that he was not solely actuated by a *bonâ fide* and honest desire to perform his duty as surveyor. If he were acting *bonâ fide*, why did he suffer the plaintiff to incur all the expense of the sale before he gave notice of his objection? There clearly was a case for the jury.

The amendment was properly allowed. It consisted merely in substituting "the houses" for "purchasers," and striking out the innuendo. [Cresswell, J. What authority is there for striking out an innuendo?](a) The alteration being made, the innuendo is insensible. The statute 3 & 4 W. 4. c. 42. s. 23. authorizes the judge to allow an amendment "when any variance shall appear between the proof and the recital or setting forth on the record, writ, or document on which the trial is proceeding, of any contract, custom, prescription, name, or other

(a) See the case of *Prudhomme v. Fraser*, 1 Mood. & Rob. 435., where Lord Denman ruled that superfluous averments

and innuendos in a declaration for libel ought not to be struck out, at the instance of the plaintiff, at nisi prius.



matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence." It has been repeatedly laid down, that, in allowing amendments under this statute, the judges should be very liberal, as otherwise the rules of *Hilary*, 4 W. 4., which restrict parties to one count or plea would operate with undue harshness. (a) In *Duckworth v. Harrison* (b), the declaration, on an agreement of reference, stated that the costs of the reference and of the award were to abide the event: at the trial, however, it appeared that the agreement also provided for the costs of making the agreement a rule of court: and it was held that the variance was amendable, notwithstanding it was urged that the effect might be to get rid of an objection that had been raised by a demurrer, upon the judgment on which (c) the defendant might have had a writ of error. [*Wilde*, C. J. The judge at nisi prius had nothing to do with the demurrer: all he could deal with was the issue that came before him to be tried. *Cresswell*, J. The question is, whether the amendment is in a matter material to the merits, and likely to prejudice the opposite party.] Every amendment must, in a certain sense, be material to the merits. In *Whitwell v. Scheer* (d) the court sustained an amendment of a declaration on a charterparty, striking out an express promise that was inconsistent and at variance with the contract declared on, and substituting a correct statement of the legal effect. So, in *Beckett v. Dutton* (e),

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(a) See, amongst others, the dicta of Parke, B., in *Sainsbury v. Matthews*, 4 M. & W. 343., and of Williams, J., in *Evans v. Fryer*, 10 Ad. & E. 609., 2 P. & D. 540.

(b) 5 M. & W. 427., 7 Dowl. P. C. 463.

(c) See 4 M. & W. 432.

(d) 8 Ad. & E. 301., 3 N. & P. 398.

(e) 7 M. & W. 157., 8 Dowl. P. C. 865.



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the plaintiff declared on a promissory note for 250*l.*, made by the defendant, dated the 9th of *November*, 1838, payable to the plaintiffs, or their order, on demand; and the defendant pleaded that he did not make the note: the proof at the trial was, of a joint and several promissory note for 250*l.*, made by the defendant and his wife, dated the 6th of *November*, 1837, payable twelve months after date: there was no proof of any other note between the parties: and it was held that this was a variance the amendment of which was authorised by the statute. (a) That is an extremely strong case: it was in fact substituting an entirely different contract. In *Sainsbury v. Matthews* (b), the defendant, in the month of *June*, agreed to sell to the plaintiff the potatoes then growing on a certain quantity of land of the defendant, at 2*s.* per sack, the plaintiff to have them at digging up time (*October*), and to find diggers: the declaration, — which stated the contract to be, to deliver the potatoes *within a reasonable time*, to be paid for on delivery, — was amended, and a new trial refused. So, in *Evans v. Fryer* (c), in assumpsit on a wager that a railroad would be completed *for the general conveyance of passengers* to *A.* and *B.* within six years, the declaration averred that the railroad was completed *for the general conveyance of passengers* to *A.* and *B.* within six years; and that averment was traversed by the plea: it was held that the judge at nisi prius was justified in amending the record agreeably to the evidence, by striking out the words “*for the general conveyance of passengers*,” in the declaration and plea. The case of *Smith v. Knowelden* (d) approaches very closely

(a) And see *Parks v. Edge*, 1 C. & M. 429., 3 Tyrwh. 364., per nom. *Parker v. Ade*, 1 Dowl. P. C. 643.; *Pullen v. Seymour*, 5 Dowl. P. C. 164.

(b) 4 M. & W. 343., 7 Dowl. P. C. 23.

(c) 10 Ad. & E. 609., 2 P. & D. 540.

(d) 2 M. & G. 561., 2 Scott, N. R. 657.



to the present. That was an action of slander, in which the words charged to have been spoken by the defendant were, "S. (the plaintiff) has got himself into trouble: he is out on bail for 100*l.*, and he is to be tried at the *Old Bailey* on *Monday* for buying cocks which have been stolen from P. & Co. by one of their apprentices, who sold them to a person named W., who again sold them to S." The words proved were — "S. has got himself into trouble: he is out on bail for 100*l.*; and *I have heard* he is to be tried," &c.; and it was held that the variance was one which the judge at nisi prius had authority to amend under this statute. *Maule, J.*, there said: "The object of the legislature in conferring upon the court or judge this power, was, to make it a substitute for the right a plaintiff formerly had, to put in his declaration several counts varying the statement of his complaint; therefore, to carry into effect the intention of the legislature, the courts should be as liberal in amendments as the pleader formerly was in the multiplicity of his counts. With respect to merits — the real question was, whether or not the plaintiff was damnified by the uttering of words by the defendant, imputing to him that he was out on bail to take his trial on a charge of having received stolen goods. If we were to hold that every thing is, within the meaning of the statute, 'material to the merits,' which may have a tendency to increase or diminish the amount of damages, we might be led to the exclusion of amendments in very many cases. The statute, however, vests a discretion in the judge: he is to take into his consideration, not merely that which appears upon the record, but also the facts brought out at the trial, and the conduct of the parties. It cannot be doubted but the defendant here intended to deny that he used any words of the nature of those which the declaration charged him with having used: neither party could

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have expected the *precise* words to be called in question." So, here, the real question was, whether or not the plaintiff was damnified by the uttering, by the defendant, of words having a natural tendency to depreciate the property offered for sale, and to deter persons present from bidding for it: and therefore the amendment could not in any degree have prejudiced the defendant in his defence to the action. [*Maule, J.* I do not see why this amendment should not have been made. In *Hemming v. Parry* (a), where the plaintiff declared on a general warranty of soundness of a horse, and the proof was of a warranty "except in a foot," the real dispute between the parties being whether the horse was a roarer, the judge allowed the declaration to be amended. (b)] Even an avowry in replevin has been amended. In *Guest v. Elwes* (c), in an action against the sheriff for allowing a defendant to escape after he had been arrested on mesne process, it was proved at the trial that an opportunity only had offered itself of making the arrest, but that the sheriff had not availed himself of it by arresting the party: the judge, on an application for leave to amend the declaration, directed

(a) 6 C. & P. 580.

(b) And see *Mash v. Denham*, 1 M. & Rob. 442. That was an action for a fraudulent misrepresentation that a certain horse was "sound, and a good worker:" the proof was, that the defendant said he warranted the horse "*sound in the wind*:" and *Alderson, B.*, said, "The variance relied upon by the defendant is not material to the merits. The merits are, whether or no the defendant made a fraudulent misrepresentation. It is proved that he did; and, though the terms

of the misrepresentation are not quite accurately stated in the declaration, it is clear that the defendant cannot have been misled by the statement. If he had been, I would not amend. But he comes here to defend himself from the charge of having made a fraudulent misrepresentation on the occasion of this sale; and, whether he represented the horse to be wholly sound, or merely sound in the wind, makes no difference in the merits."

(c) 5 Ad. & E. 118., 2 N. & P. 230.



the jury to find the facts specially, reserving the question of the plaintiff's right to amend, for the opinion of the court; and the court, holding that the variance was immaterial to the merits of the case, and that the misstatement could not have prejudiced the defendant in the conduct of his defence, gave judgment for the plaintiff according to the finding of the jury, pursuant to the twenty-fourth section of the 3 & 4 *W. 4. c. 42*.

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*Channell* and *Byles*, Serjts., and *Badeley*, in support of the rule. In order to sustain this action, it was necessary for the plaintiff to prove *actual* malice: *Hargrave v. Le Breton* (a); *Pitt v. Donovan* (b); *Smith v. Spooner* (c); *Toogood v. Spyring* (d); *Malachi v. Sloper*. (e) In this the evidence clearly failed. The conduct of the defendant had reference solely to his official character, and evinced nothing more than a desire properly to discharge the onerous and complicated duties which the act imposes upon him. All he meant, was, that, until the roads were made as he conceived the act required that they should be, he would withhold his official sanction to the houses being considered finished. And it is not by any means surprising that he should mistake the nature and extent of his duties, seeing that the legislature has already found it necessary to explain and amend this statute (g), and that the learned judge who presided at the trial himself hesitated to put a construction upon it. In *Starkie* on Evidence (h), the rule is thus laid down:—“Where it appears that the words were spoken, or libel published, on an occasion, and under circumstances, which the law regards as privileged, that

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(a) 4 *Burr.* 2422.(b) 1 *M. & S.* 639.(c) 3 *Taunt.* 246.(d) 1 *C. M. & R.* 181., 4 *Tyrwh.* 582.(e) 3 *N. C.* 371., 3 *Scott*, 723.(g) By the 9 & 10 *Vict. c. 5*.

(h) Vol. II. pp. 630, 631. 3rd edit.



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is, as it seems, where they were spoken or published in the *bonâ fide* discharge of some legal or moral duty to society, or even in the fair and honest prosecution of the rights of the party himself, or the protection of his interests, the plaintiff will fail, unless he can establish the malicious intention, by means of the words or libel, or by sufficient extrinsic evidence, and shew that the defendant used the occasion as a mere colour and pretext for venting his malice. In some instances, indeed, where the publication occurs in the performance of a legal duty, which the defendant is *bound* to perform, the occasion of publication is not merely *evidence* to rebut the inference of malice, but is an absolute bar to the action; as, where the party was acting in the capacity of a judge, or witness, or party in the cause. And in such cases the malice of the party is immaterial. In other cases, where the publication arises in the course of discharging any duty the performance of which is required by the ordinary exigencies of society, although the party was under no absolute legal obligation to perform it, the occasion operates in the nature of evidence, and supplies a *primâ facie* justification.” (a) Whether the obligation is imposed by the common law or by statute, can make no difference in principle. To render the defendant liable, there must be clear and unequivocal proof of actual malice.

The amendment made at the trial was altogether unwarranted by the statute: it was clearly in a matter material to the merits, and likely to prejudice the defendant in his defence to the action. It is true that an amendment was allowed in slander, in the case of *Smith v. Knowelden*: but there the amendment was not in a matter that could, in any sense, be material to the merits;

(a) See *Coxhead v. Richards*, *antè*, Vol. II., p. 569.; *Blackham v. Pugh*, *Ib.* 611.; *Bennett v. Deacon*, *Ib.* 628.



the words were actionable *per se*. In a case of this sort, the slightest alteration in the words may be most material: and *Tindal*, C. J., in the case last referred to, (a) observes that it is difficult to give a precise meaning to the words “merits of the case,” when applied to an action of slander. At all events, the amendment can only have reference to the words proved. There can be no amendment to interfere with the innuendos; for, there is nothing by which they can be amended; which *Alderson*, B., in *Wood v. Duncan* (b), seems to have thought an essential condition. Upon this subject, it is laid down in *Chitty on Pleading* (c), “whenever an inducement, or prefatory statement of some extrinsic fact, to which the libel or words referred, is essential, the omission is fatal; and there must also be an innuendo expressly referring to such inducement.” [*Williams*, J. The innuendo is not material, if the colloquium be sufficiently explanatory. Here, the colloquium states the words to have been spoken of and concerning the plaintiff, and of and concerning the said houses.] An amendment is not allowed where it will affect the defendant’s right to move in arrest of judgment. (d) [*Maule*, J. Is every ground of motion in arrest of judgment material to the merits of the case?] *Prima facie* it must be so assumed. Where the whole is one conversation, and all is material to make up the charge, the whole must be proved: *Flower v. Pedley*. (e) To try it by the test of pleading — suppose the defendant, professing to justify the whole charge, omitted to justify this particular part, his plea would clearly be demurrable: *Ingram v. Lawson* (g); *Cooper v. Lawson* (h)

(a) 2 M. &amp; G. 561.

(b) 7 Dowl. P. C. 91.

(c) Vol. I. p. 407.

(d) Per Lord Denman, C. J., and Patteson, J., in *Atkinson v. Raleigh*, 3 Q. B. 79.

(e) 2 Esp. N. P. C. 491.

(g) 5 N. C., 66., 6 Scott, 775.

(h) 8 Ad. &amp; E. 746., 1 P. &amp; D. 15.

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In *David v. Preece* (a), to an action on a promissory note, the defendant pleaded that the holder accepted another note, with an additional party, in satisfaction of the first. It appeared in evidence that this other note had been given and accepted in satisfaction, not of the note declared on, but of an intermediate note which had been given, without the additional party, in satisfaction of the note declared on: and it was held that this was a variance, and that the judge at nisi prius had no power to amend the plea by substituting a description of the intermediate note. In *Boucher v. Murray* (b), a declaration on a guarantee stated, that, in consideration that the plaintiff would *make advances* of money by way of loan, to B., the defendant promised to repay the *plaintiff* such sums as he should so *advance*, if B. should make default; breach, that B. made default, and that the defendant did not pay the *plaintiff*. The defendant pleaded that the plaintiff did not *make* the said advances to B., in manner and form, &c. Issue thereon. The judge at the trial ordered the declaration and plea to be amended under the statute 3 & 4 W. 4. c. 42. s. 23., by stating in the count, that, in consideration that the plaintiff would *procure the British-and-Australian Bank, in which the plaintiff was a partner*, to make advances &c. to B., defendant promised the plaintiff to repay *the said bank* such sums as the plaintiff should so *cause to be advanced*, &c.; and, in the plea, that the plaintiff did not *procure the said bank* to make the said advances. And the court held that such amendment was not warranted by the statute. In *Gurford v. Bayley* (c), where the promise declared on was, that the defendant should lay out a sum of money in the purchase of a government *annuity*, and the proof

(a) 5 Q. B. 440.  
(b) 6 Q. B. 362.

(c) 3 M. & G. 781, 4 Scott,  
N. R. 398.



was, that it was intrusted to him to be invested in a government *security*, the variance was held to be amendable by the judge at nisi prius; *Tindal*, C. J., observing that "whatever would be available to the defendant as a defence under the declaration as it originally stood, would be equally so after the alteration was made." In *Guest v. Elwes*, the judge refused to allow the amendment; and the alteration was afterwards made under the special finding of the jury pursuant to s. 24., the distinction between which and the amendment at nisi prius under s. 23., is pointed out by Lord *Denman* in the course of the argument. The principle of that decision is wholly inapplicable here; for, it is extremely difficult in many cases to ascertain whether that which has taken place, amounts to an escape or not. The amendments allowed in *Duckworth v. Harrison*, *Beckett v. Dutton*, and *Evans v. Fryer*, did not in any degree affect the merits of the question the parties went down to try. The evident inclination of the courts latterly has been rather to restrict than to extend the doctrine of amendments.

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*Cur. adv. vult.*

WILDE, C. J. The rule in this case prays that a nonsuit may be entered or a new trial granted. At the trial before my brother *Coltman*, certain objections were taken, which, if well founded, entitled the defendant to a nonsuit. Leave was accordingly reserved to him to move that a nonsuit might be entered; and, though some doubt has been entertained as to the precise grounds upon which such leave was reserved, it appears to us that it must be taken to have been co-extensive with the objections that properly went to a nonsuit.

The action is in the nature of an action for slander of title. The declaration alleges that the plaintiff was possessed of an unexpired term in certain unfinished houses



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situate in a place called *Agar Town*, wherein divers roads were then marked out and unfinished; that the place in question was part of a certain district for the administration, and within the operation, of the building act, 7 & 8 *Vict. c. 84.*; that the said houses were approached by, and adjoined to, a certain roadway of the width, quality, and description required by the act; that the plaintiff was desirous of selling his interest in the houses by public auction, and had accordingly advertised and put up and exposed the same to sale; and that the defendant, who filled the office of surveyor for the district within which the houses were situate, contriving, and *falsely and maliciously* intending, to injure the plaintiff, and to cause and induce the persons attending the sale to believe and apprehend that there was no such roadway to one of the fronts of the said houses as required by the act, and to interrupt the sale, and to hinder and prevent the plaintiff from selling or disposing of his said estate or interest in the same, and to cause the plaintiff to lose and be deprived of divers great gains which he might, and otherwise would, have reaped and derived from the said sale, and to lose and be deprived of the expenses attending the said exposure to sale, &c., and to cause the said estate to be sold for a much smaller price than the said houses otherwise, but for the committing the grievances thereafter mentioned, would have realised and produced, and to vex, harass, and oppress the plaintiff, *wrongfully, injuriously, falsely, and maliciously*, and without any reasonable or probable cause, and under colour of his said office, and under the false and malicious pretence of executing the same, attended, and was present at, and upon, such exposure to sale of his said estate and interest in the said houses, and then, upon such exposure to sale, and before the said estate and interest had been put up for sale, *falsely and maliciously*, under colour and pretence of executing his



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said office, in the presence and hearing of divers liege subjects present and attending the said sale for the purpose of bidding for and purchasing the said houses, spoke and published certain words, to the effect that he had authority, as such district surveyor, to prevent the houses from being finished until the roads in *Agar Town* were made pursuant to the act. The defendant pleaded not guilty, and a justification as to a portion of the words, on the ground that there was not such roadway to one of the fronts of the said houses, of the width, quality, and description required by the act. At the trial, witnesses were called, who proved that the houses were put up for sale; that the defendant had, before the day of sale, told certain persons that he would attend for the purpose of warning buyers that they must purchase subject to the inconveniences that resulted from the non-completion of the roads; and that the defendant accordingly did attend the sale, and there used expressions to the effect that he had power to prevent the houses from being finished or occupied, until the roads were completed. It appearing that there was a variance between the evidence given and the words set out in the declaration, the plaintiff asked leave to amend the statement. The learned judge was of opinion that he had power, under the statute, to allow the amendment: and, he accordingly did so, by substituting for the words in *italic* in the first count, the words “the houses,”—reserving it to the court to say, whether or not the amendment was one that was authorised by the statute; and the cause proceeded upon the footing of the record having been so amended.

It is not necessary to the decision of this case that we should enter upon the discussion of this point. But, at the same time, having considered the matter, it may be convenient to state my view of it. In order to ascertain whether the variance between the record and the evi-



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dence is within the statute which gives the judge at nisi prius power to amend, it is requisite, in each case, to look at the facts offered in evidence, and at the matter that is sought to be amended, in order to see whether or not the proposed amendment will affect the merits of the case, or prejudice the opposite party in the conduct of the action or defence. In one sense, every amendment by which the plaintiff seeks to avoid a nonsuit, is material: but it is not always so in the sense intended by the legislature. The judge must, in each case, determine, whether, regard being had to the state of the record and the evidence adduced before him, justice is likely to be advanced or defeated by the amendment proposed; justice being that the cause should go to the jury freed from all technical objections. It appears to me that the amendment in the statement of the words charged, might properly be made, provided such amendment did not affect the substantial merits to be tried. The substantial question here was, whether the defendant used words asserting power in himself to control and prevent the completion of the plaintiff's houses until the roads in *Agar Town* should have been made; or, in other words, whether the plaintiff's title to sell the houses was subject to the infirmity suggested. The *gravamen* was, the slander of the plaintiff's title. It was necessary that the slander should be set out. I am of opinion that the words as originally laid, did in fact assert that the defendant had, as district surveyor, power to prevent the completion of the houses, for the reason alleged; and that the amendment only introduced, in other words, an assertion to the same effect; and, therefore, that the alteration proposed was in a particular not material to the merits — the substantial question the parties went down to try. The defendant could not have offered any defence as to one set of words, which would not have been equally an answer to the other set. The amendment,



therefore, in my judgment, was one which it was competent to the judge to order to be made.

Looking at the record in its amended shape, the next question is, whether there was evidence that was proper to be submitted to the jury to shew that the defendant had acted maliciously. It seems to have been admitted, — and, indeed, it could not well have been denied, — that proof of *actual* malice was requisite to sustain the action. The declaration is framed with reference to that view of the law. On the part of the defendant it has been insisted, that, not only was there no evidence that would warrant the jury in inferring actual malice, but that there was none that the judge was warranted in submitting to them. In determining this question, regard must be had to the situation of the defendant. He was not a mere volunteer, impertinently and intrusively interfering with another man's concerns, having no duty or obligation of any sort imposed upon him. He was a surveyor appointed under an act of parliament to perform duties of a very important character, — to see that all persons employed in constructing buildings in the district for which he acted, duly conformed to the provisions of the act. In considering this point, it will be necessary to refer to several parts of the statute. It is intituled “An act for regulating the construction and the use of buildings in the metropolis and its neighbourhood.” The preamble recites, amongst other things, that, “forasmuch as in many parts of the metropolis, and the neighbourhood thereof, the drainage of the houses is so imperfect as to endanger the health of the inhabitants, — it is expedient to make provision for facilitating and promoting the improvement of such drainage;” that, “forasmuch as by reason of the narrowness of *streets*, lanes, alleys, and the want of a thoroughfare in many places, the due ventilation of crowded neighbourhoods is often impeded,

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and the health of the inhabitants thereby endangered, and, from the close contiguity of the opposite houses, the risk of accident by fire is extended, — it is expedient to make provision with regard to the streets and other ways of the metropolis, for securing a sufficient width thereof;” and that “forasmuch as great diversity of practice has obtained among the officers appointed in pursuance of the said acts (a) to superintend the execution thereof in the several districts to which such acts apply, and the means at present provided for determining the numerous matters in question which constantly arise, tend to promote such diversity, to increase the expense, and to retard the operations of persons engaged in building, — it is expedient to make further provision for regulating the office of surveyor of such several districts, and to provide for the appointment of officers to superintend the execution of this act throughout all the districts to which it is to apply, and also to determine sundry matters in question incident thereto, as well as to exercise, in certain cases, and under certain checks and control, a discretion in the relaxation of the fixed rules, where the strict observance thereof is impracticable, or would defeat the object of this act, or would needlessly affect with injury the course and operation of this branch of business.” The first section then provides that the act shall come into operation, as to the districts and the officers to be appointed in pursuance thereof, on the 1st of *September*, 1844, and as to the buildings, streets, and other matters, on the 1st of *January*, 1845. The second section gives a definition or statement of the sense in which certain terms and expressions used in the act are to be understood; amongst others, the word “*street*” is to include “every square, circus, crescent, street, *road*, place, row, mews,

(a) i. e. the statutes wholly      viz. the 14 G. 3. c. 78., 50 G. 3.  
or in part repealed by that act,      c. 75., and 3 & 4 Vict. c. 85.



lane, or place along which carriages can pass, or *are intended to pass*, and that whether there be or be not, in addition to the carriage-way, a foot-way, paved or otherwise;" the words "*already built*," used in reference to buildings, are to apply to "buildings built before the 1st of *January*, 1845, or commenced before that day, and covered in and rendered fit for use within twelve months thereafter," and, used in reference to streets, and alleys, to "all streets or alleys made or laid out before that day, and which shall be formed and rendered fit for use within twelve months thereafter;" and the words "hereafter to be built," used in reference to buildings, are to apply to "all buildings to be built or commenced after the 1st of *January*, 1845, or which, being commenced, shall not be covered in within twelve months thereafter," and, used in reference to streets and alleys, to "all streets or alleys not laid out before the said 1st of *January*, or which, being laid out, shall not be rendered fit for use within twelve months thereafter." It is within the latter description that the property now in question falls, neither the houses nor the road having been completed within the prescribed period. The eighteenth section, for the purpose of more effectually enforcing the observance of the provisions of the act, enacts, 'with regard to any buildings, drains, &c., which shall be hereafter built, rebuilt, enlarged, or altered within the limits of this act, contrary to the provisions hereof, so far as relates to the removal thereof, — that, if the same be not built, rebuilt, enlarged, or altered in the manner and of the materials, and in every other respect according to, and in conformity with, the several rules and directions which are in this act particularly specified, and if any person build or begin to build, &c., or alter, &c., or use or cause to be used, any part of any ground or building, projection, drain, or other

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thing, contrary thereunto ; and if in either of such cases it so appear by the certificate of the official referees, then the said building, projection, drain, or other thing, or such part thereof so irregularly built or begun to be built, or so irregularly altered or begun to be altered, or so used, shall be deemed a nuisance ; and thereupon it shall be the duty of the surveyor, and he is hereby directed, to summon the builder before any two justices of the peace : ” and the clause goes on to provide for the mode of proceeding, and the removal of buildings, &c., so declared nuisances. By section 52., for the purpose of making provision concerning streets and other ways of the metropolis, it is enacted, “ with regard to such streets and other ways hereafter formed, so far as relates to securing a sufficient width thereof, that, from the passing of this act, all the conditions, regulations, and directions contained in the schedule (I.) to this act annexed, shall be duly observed and performed ; and that, if any person offend in respect thereof, he shall be liable to all the penalties and forfeitures by this act imposed in respect of any buildings either built contrary thereto (*a*), or without due notice to the surveyor appointed in pursuance of this act to inspect such buildings.” (*b*) By the schedule which is here referred to, “ every street (excepting any mews) must be of the width of forty feet at the least ; but, if the buildings fronting any street be more than forty feet high from the level of the street, then such street must be of a width equal at the least to the height of the buildings above such level.” And in schedule (K.) is the following provision with regard to buildings of the first class : — “ Every such building must be built with some *roadway*, either to it or to the inclosure about it, of such width as will admit, to

Section 52.

Schedule (I.)

Schedule (K.)

(*a*) See Section 18.(*b*) See Section 13.



one of its fronts, of the access of a scavenger's cart, of the ordinary size of such carts." What is meant by "roadway" here, — whether it means a road properly formed and capable of being used as such, or whether this provision would be complied with by building on the edge of a ploughed field, — may be matter of doubtful speculation. The 68th section, which professes to enumerate the functions and duties of the surveyor, requires him "to see that all the rules and directions of the act are well and truly observed in and throughout his district." By section 71. he is required to make a solemn declaration of official fidelity, before entering upon the duties of his office. The seventy-seventh section, which regulates the surveyor's fees, provides, that, "if the work in respect of which such fee shall become payable, have not been done in every respect agreeably to the directions of this act, then it shall not be lawful for any surveyor to receive such fee. By receiving his fee, therefore, the surveyor in effect certifies that in his judgment the buildings are completed in conformity with the act. Section 79. imposes penalties on the surveyor, if he shall be guilty of extortion, or "if at any time he wilfully neglect his duty, or behave himself negligently or unfaithfully in the discharge thereof." Under this provision, the surveyor would undoubtedly be liable to a penalty for suffering any houses in his district to be built otherwise than in conformity with the act. Sections 80, 81, and 82. respectively relate to the appointment of the official referees, their functions, and the course of proceeding to put them in motion. The 108th section, which regulates actions against persons acting under the act, contains words not usually found in acts of parliament: it begins — "and for regulating proceedings against persons acting in pursuance of this act, be it enacted, with regard to any action or suit against any person in

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respect of any act or thing done *or intended to be done* in pursuance of this act, so far as relates to the limitation thereof, and to the notification thereof to the offending party, and to the venue thereof, and to the pleadings therein, and to the evidence of the matters thereof, and to the verdict therein, and to the judgment of the court thereon, and to the costs of such action, and to the recovery of such costs," — and then it goes on to provide that no such action shall be brought after the expiration of six months next after the fact committed, that the defendant shall have twenty-one days' notice of action, that the venue shall be laid in *London* or *Middlesex*, and that the defendant may plead the general issue, and give the act, and the special matter, in evidence.

It appears that the defendant, in his capacity of surveyor under this act, insisted that the houses in course of building by the plaintiff, were not constructed in conformity with the act, inasmuch as there was no finished roadway of the width required by schedule (K.), and asserted that he had power under the statute to stop the completion of the buildings until such roadway was properly constructed. The learned judge was of opinion that the mere leaving a space of the required width was not a due compliance with that provision, but that there must be a formed road. Whether this be or be not the true construction, it is not necessary to determine. The charge against the defendant is, that he asserted a right to prevent the completion of the buildings. In cases of this sort, there is always much danger of mistake on the part of those who are called to prove the words spoken. Here, there was some discrepancy in the evidence of the three witnesses who were examined: but, looking at the whole of it, I incline to think the defendant must be taken to have meant this — that, inasmuch as the houses were subject



to inspection, and could not be considered completely finished unless so certified by him as district surveyor, he would not, by receiving his fee, allow or admit that they were completed, until a proper roadway was made thereto in conformity with the act. Even assuming that he meant to assert a right to stay the actual progress of the builder, — and some of the expressions used by him seem to be consistent with that view, — still the question is whether there was any thing in it that could properly be submitted to the jury as evidence of malice; whether the defendant was actuated by a malicious intention to injure the plaintiff, and was not acting under a mere misconception of the power and authority vested in him by the statute.

One of the leading authorities upon this subject, and one that has never been upon any occasion impugned, is the case of *Pitt v. Donovan*. That was an action for slander of title, conveyed in a letter to a person about to purchase an estate of the plaintiff, imputing insanity to Y., from whom the plaintiff purchased it, and stating that the title would therefore be disputed, *per quod* the proposed purchaser refused to complete. It appeared at the trial that the defendant was a trustee under the marriage settlement of Y., and had married his sister; that, under the marriage settlement, a term of years in the estate in question was vested in the defendant as trustee for securing to Mrs. Y. her jointure; and that the defendant's wife was heir-at-law to her brother Y., in the event of his dying without issue. After a lengthened inquiry into the sanity of the plaintiff, and his competency to execute a conveyance, *Graham, B.*, left the question to the jury upon the evidence, stating to them, in the course of his summing up, "that, in order to maintain the action, some malice must be fixed on the defendant, that is, the act must be injurious, and proceeding from an improper motive;

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that, if the evidence satisfied them as men of good sense and good understanding, that Mr. Y. was insane, or if the defendant entertained a persuasion that he was insane, upon such grounds as would have persuaded a man of sound sense and knowledge of business, then the defendant would be entitled to a verdict." A verdict having been found for the plaintiff, Lord *Ellenborough*, in making absolute a rule for a new trial, on the ground of misdirection, says: "I cannot help thinking that the point which was peculiarly for the consideration of the jury, and on the event of which this case ought to depend, was not left to them correctly, and that it ought, therefore, to be presented to the consideration of another jury; and that point is, whether the defendant made the statement *bonâ fide*, and under an honest impression of its being the truth, or whether he made it maliciously, and for the purpose of slandering the title of the person that was about to convey his estate. The learned judge has given us the terms in which he left the case to them — 'that they were to consider the question, and to judge on the whole of the evidence.' No doubt of that. 'That the gist of the action was malice.' Undoubtedly it was so. 'Not malice in the worst sense: but it was enough that the act done was wrongful, and done under circumstances that marked an intention to do an injury: and that would depend, not on the circumstance whether he believed it to be true, but whether his belief was such as a man of sound mind, or a man of sense and knowledge of business, would have formed.' Now, that is what he was not justified in saying; for, with reference to the competency or incompetency of Mr. Y., certainly the question in this cause does not depend on that (a); for, if what the defendant has written be most untrue, but

(a) Alluding to a part of Lord *Ellenborough*), which left the summing up (omitted by the fact of insanity to the jury.



nevertheless he believed it, *if he was acting under the most vicious of judgments*, yet, if he exercised that judgment *bonâ fide*, it will be a justification to him in his case. Whether his belief be such as a man of sound sense and knowledge of business would have formed, is not the question; the opinion which a rational man would have formed on such a subject might be what Mr. Y. was competent; but that the jury must arrive at their conclusion in this case through the medium of malice or no malice in the defendant." His lordship afterwards adds: "I am aware that there are many things reprehensible in the letters, but they are no slander of the title, if the defendant believed them. They contain disrespectful and improper passages, such as may perhaps be libellous on the person of the party whom they concern; but they are rather a confirmation of his belief that there was an objection existing against the man, on the ground of his incompetency to do the act, and that it was proper to make it to the person with whom he was corresponding. I should be very sorry if it were supposed, from the result of this motion, that there is the least imputation on the gentleman who is the plaintiff in this cause. There is not any ground for saying that he has conducted himself with any view to his own interest in this transaction; on the contrary, he has conducted himself rather delicately and nicely. But the question does not turn upon his conduct; and this is a case the decision of which is to govern other cases where the question of slander of title may occur; in which case the *bona fides* of the communication, and not whether a man of rational understanding would have done so and so, is the question to be canvassed. A man of intemperate passions, or of weak understanding, or a man acting under an erroneous impression, may be carried further than a man of more mature judgment; but still he would not be liable to

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an action of slander of this sort." Every sentence of that judgment is deserving of the utmost attention: and *Bayley* and *Dampier*, JJ., delivered opinions to the same effect, — holding the proper question to be, malice or no malice, and that the defendant had such a degree of interest in the subject-matter as to prevent his being looked upon in the light of a stranger.

Let us, then, see whether there was any ground upon the evidence, whence it might or ought to have been left to the jury to infer that the defendant made the statement he did under the influence of malice, in the sense necessary to sustain the action. In the first place, the defendant was not a mere intruder: he was a person to whom was confided the duty of seeing the provisions of a most important act, properly attended to. The sale had been advertised for six weeks; and it is said that the defendant, therefore, had ample time, and was bound, to intimate his objection earlier than he did. Suppose he might, does the fact of his omission to do so furnish any ground for inferring malice? But it appeared, that, on the 27th of *February*, which was three days preceding the day of sale, the defendant did give the plaintiff notice of what he considered to be infractions of the act. It is to be observed, too, that all the witnesses appeared to be more or less connected with the plaintiff; that two of the houses were sold; and that the only witness who stated that he was deterred by the defendant's threat from bidding at the sale, was, at the time of the trial, a tenant under the plaintiff. Next, it appears that the only objection stated by the defendant in the sale-room, was, as to the insufficiency of the roadway. If maliciously disposed, he might then have urged another objection, viz. as to the insufficiency of the drains; for, it appeared, that, between the date of the notice and the 16th of *March*, the day on which the defendant's information was heard before the official



referees, the plaintiff had caused that defect to be remedied. The only other piece of evidence that was relied on as shewing malice, was the remark made by the defendant in the presence of the official referees. When asked by a friend of the plaintiff's, "Why do you *pursue* Mr. *Pater*?" adopting the language of the question, the defendant answered — "The reason I *pursue* him, is, because he is steward and collector for Mr. *Agar*; and, as I cannot attack Mr. *Agar*, I attack Mr. *Pater*." What was a proper motive on the part of a person in the defendant's position? Why, to obtain a due and faithful observance of the act. What is the motive the defendant assigns? He says, in effect, "I am desirous of getting the roads in *Agar Town* completed: I have but one mode of enforcing that, viz. by stopping the buildings: and you, Mr. *Pater*, being the agent of Mr. *Agar*, the ground-landlord, are the most proper person for me to pursue for that purpose." It is not shewn that the defendant had, or could have, any feeling of personal hostility against the plaintiff: and the ground assigned by him for selecting the plaintiff, is perfectly consistent with good faith. What was said afterwards as to the plaintiff's withdrawing his action, can hardly be relied on as shewing that the defendant was acting from personal and vindictive motives. Whether, therefore, the roadway was or was not properly set out within the meaning of the act, whether it was the defendant's duty to take steps to get the road out into an efficient state, or whether he had any power or authority under the act to interfere at all, is not the question here. We must be satisfied that there was legal evidence to warrant the jury in inferring malice. The absence of authority in the defendant to act as he did, is relied on by the plaintiff as a circumstance from which the jury might be justified in inferring malice.

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But, was it so clear that the act did not warrant the assumption of right claimed by the defendant? I must confess I have entertained some doubt, though I incline to think that the buildings might be held to be completed, although the roadway were left in an unfinished state. It is to be observed, however, that the act, which had but recently passed, had not been the subject of any judicial decision; and that the defendant is not a lawyer. I am unable, therefore, to bring myself to the conclusion that the defendant had no probable cause for adopting the construction he did, though it might not be a strictly correct one. But, even if he had no probable cause for so construing the act, I am clearly of opinion that the circumstances were not such as to warrant an inference of malice. There was an entire absence of any expressions of ill-will towards the plaintiff, or of any remarks unconnected with the supposed performance of the defendant's duty under the act. All seems to have been done in the honest and *bonâ fide* belief that it was in pursuance of his duty.

For these reasons, I am of opinion that the rule for entering a nonsuit should be made absolute.

MAULE, J. I concur with the lord chief justice in thinking that the amendment made at the trial was properly made, and that (the declaration being so amended) there was no case to go to the jury for the plaintiff. His lordship having gone so fully into the matter, and having stated so clearly the way in which the question arises, it is scarcely necessary for me to add a word.

As to the  
 amendment.

The twenty-third section of the 3 & 4 W. 4. c. 42.—reciting that “great expense is often incurred, and delay or failure of justice takes place at trials by reason of variances as to some particular or particulars between the proof and the record or setting forth on the record



or document on which the trial is had, of contracts, customs, prescriptions, names, and other matters or circumstances not material to the merits of the case, and by the misstatement of which the opposite party cannot have been prejudiced, and that the same could not in any case be amended at the trial, except where the variance was between any matter in writing or in print, produced in evidence, and the record (a)" — gives power to the judge, if he shall see fit so to do, "to cause the record, &c., when any variance shall appear between the proof and the recital or setting forth on the record, &c., of any contract, custom, prescription, name, or other matter, in any particular or particulars in the judgment of such court or judge not material to the merits of the case, and by which the opposite party cannot have been prejudiced in the conduct of his action, prosecution, or defence, to be forthwith amended, &c., on such terms, as to payment of costs to the other party, or postponing the trial, to be had before the same or another jury, or both payment of costs and postponement, as such court or judge shall think reasonable; and, in case such variance shall be in some particular or particulars in the judgment of such court or judge not material to the merits of the case, but such as that the opposite party may have been prejudiced thereby in the conduct of his action, prosecution, or defence, then such court or judge shall have power to cause the same to be amended, upon payment of costs to the other party, and withdrawing the record or postponing the trial as aforesaid, as such court or judge shall think reasonable," &c. The words of the act assume that the variance must be in a matter that is *material*; the restriction is as to its materiality *to the merits of the case*, that is, material with reference to the

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pleadings and the course of the cause at the trial. Was the variance here in a matter material to the merits of the case? For the purpose of ascertaining this, an inspection of the record is material, not conclusive. The record is evidently defective in consequence of a mistake in copying the declaration from the pleader's draft — some omission or transposition of words. The amendment does not substantially alter the charge, and could not possibly prejudice the defendant in his defence. If the statute did not apply to such a case, it would not have the beneficial operation contemplated.

As to malice.

The remaining question is, whether there was evidence to go to the jury upon the general merits of the case, — any evidence of express malice. This is an action for slander of title, which is a sort of metaphorical expression. Slander of title may be of such a nature as to fall within the scope of ordinary slander. Slander of title ordinarily means a statement of something tending to cut down the extent of title, which is injurious only if it is false. It is essential, to give a cause of action, that the statement should be false; and therefore falsehood is given in evidence under not guilty, since the new rules. It is essential also that it should be malicious: not, as Lord *Ellenborough* observes in *Pitt v. Donovan*, malicious in the worst sense; but with intent to injure the plaintiff. If the statement be true, if there really be the infirmity in the title that is suggested, no action will lie, however malicious the defendant's intention might be. The jury *may* infer malice from the absence of probable cause; but they are not *bound* to do so. The want of probable cause does not necessarily lead to an inference of malice; neither does the existence of probable cause afford any answer to the action. Suppose one having an infirm title to property which he is going to sell, or to make the subject of a settlement, and another, moved by spite and malice, discloses



what he believes to be a defect, though the information afterwards turns out to be untrue, and injury results to the former; in that case, an action would lie, the statement being false and malicious, and injurious to the plaintiff. Unless he shews falsehood and malice and an injury to himself, the plaintiff shews no case to go to the jury. If, therefore, we are of opinion that there was no evidence of malice, it is unnecessary to decide whether or not the defendant's statement was false, and consequently unnecessary for us to determine what is the proper construction of the act. We must assume that the defendant *thought* he had power to stop the buildings. If he *had* such power, however malicious his conduct, no case could be made against him. If he had no such power, then alone can the question of malice become material. The construction I should put upon the act, is, that the defendant had not the power he assumed to have, and that a "roadway" does not necessarily mean a complete or made road. The act, however, is not free from doubt. Assuming, then, that the defendant had not the power he said he possessed, I agree with the lord chief justice in thinking that there was no evidence to go to the jury that he was actuated by malice. He was not a stranger to the transaction. It was his duty to interfere. He is to decide on the nature and extent of his powers; and he must take care that he does not stop short of his duty. It must be borne in mind, that, of all questions that are presented for judicial decision, none are so difficult as those that arise upon acts of parliament. Surely, then, in dealing with a statute of confessedly doubtful and difficult construction, malice is not to be inferred from mere mistake. Where a man has no pecuniary motive, and the act is equivocal, the charitable presumption is, that he is not actuated by bad motives.

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For these reasons, I am of opinion that the rule for entering a nonsuit must be made absolute.

CRESSWELL, J. I am entirely of the same opinion. The amendment made at the trial, being of a matter not material to the merits of the case, was properly made. Whether the words, as they originally stood in the declaration, or the words deposed to by the witnesses, were those actually spoken, could make no difference as to the defence. The defendant could sustain no prejudice by the amendment. No new plea could be necessary. The two conditions required by the statute, therefore, concur in favour of the amendment.

With respect to the other point, it may be doubtful whether the defendant took a correct view of the duty imposed upon him by the 7 & 8 *Vict. c. 84*. But there is nothing in the evidence to shew that he did not honestly and *bonâ fide* believe his construction of the act to be a correct one. There is nothing at all to justify an inference of malice. No reasonable man could infer it: and therefore there was nothing to be left to the jury.

V. WILLIAMS, J. I am of the same opinion. I think we should materially infringe upon the rule that requires a plaintiff in an action of this sort to give evidence of malice, if we were to hold that there was any thing here that could properly be submitted to the jury. I never saw a case so utterly bare of circumstances to warrant an inference of malice.

Rule discharged.



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## LEE v. SIMPSON.

Jan. 19.

**D**EBT, for penalties under the dramatic copyright act, 3 & 4 W. 4. c. 15. (a)

The declaration stated, that, after the passing of the 3 & 4 W. 4. c. 15., intituled "An act to amend the laws relating to dramatic literary property," the plaintiff was the author of, and did compose, a certain dramatic entertainment called "*Princess Battledore, or Harlequin Shuttlecock*," and that he was and still is the proprietor hereof, and as such had and has the sole liberty of representing the said dramatic entertainment; and that, within twelve calendar months next before the commencement of the suit, and whilst the plaintiff was such author and proprietor, the defendant, on twenty-three several occasions, to wit, on &c. &c., and without the consent in writing of the plaintiff, so being such author and proprietor as aforesaid, did cause the said dramatic entertainment to be represented at *a certain place of dramatic entertainment*, called the "Theatre Royal, Liverpool," in the county of *Lancaster*, contrary to the form of the statute &c.; whereby he the defendant be-

In an action upon the statute 3 & 4 W. 4. c. 15. s. 2. for penalties for the representation of a dramatic piece of the plaintiff's at a "place of dramatic entertainment," without his consent, it is sufficient to describe the offence in the words of the act.

An introduction to a pantomime, — that is, the only *written* part of the entertainment, — is within the

protection of the act.

To constitute the *offence*, it is not necessary to shew, nor need the declaration aver, that the defendant *knowingly* invaded the plaintiff's right.

To satisfy an undertaking in such a case to give material evidence in *Middlesex*, the plaintiff, having, in order to prove the authorship, first shewn himself possessed of the manuscript in the county of *Surrey*, proved that it was by his direction offered for representation or sale in *Middlesex*, to the proprietor of a theatre there: — Held, that this, as evidence in confirmation of the previous proof of authorship, was sufficient evidence in *Middlesex* to satisfy the undertaking.

(a) Extended to dramatic actions, by the 5 & 6 Vict. c. 45. ss. 20, 21.



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came and was liable to pay to the plaintiff, for each such representation, not less than 40s., or the amount of the benefit or advantage arising from each of such representations, or the injury sustained by the plaintiff thereupon, whichever should be the greater damages : and the plaintiff averred that 40s. was the greatest damages recoverable by him according to the statute, in respect of each of such representations, &c.

Plea, *nil debet*, “ by statute.”

The cause was tried before *Coltman, J.*, at the first sitting at *Westminster* in this term.

The venue, which was originally laid in *Middlesex*, had been changed to *Liverpool*, and restored to *Middlesex* upon the ordinary undertaking on the part of the plaintiff to give material evidence in that county.

It appeared, that, in the year 1838, the plaintiff wrote an introduction to a pantomime called “ *Princess Battle-dore, or Harlequin Shuttlecock.*” The work was composed at the plaintiff’s residence in *Surrey*. It existed only in manuscript. The representation by the defendant took place at a theatre at *Liverpool*, where it was performed twenty-three nights. The defendant had purchased the pantomime in 1843 from one *De Hays*, in the *bonâ fide* belief that *De Hays* was the author of it. The evidence relied on by the plaintiff as satisfying his undertaking to give material evidence in *Middlesex*, was as follows : —

The plaintiff’s brother proved, that he had seen the manuscript of the pantomime in question, in the possession of the plaintiff in the years 1838 and 1839 ; that, in *October, 1842*, he received the manuscript from the plaintiff in *Surrey*, and, by his direction, took it to one *Gomersall*, the manager of the *Garrick Theatre*, in *Goodman’s Fields*, in the county of *Middlesex* ; that *Gomersall* did not accept it ; and that he, the witness, thereupon returned it to the plaintiff.



Another witness, named *Forrester*, also proved that he, in 1841, heard the plaintiff read, apparently from a manuscript, two lines of a pantomime bearing the same title as the one in question, at the plaintiff's house in *Surrey*; and that he, the witness, suggested to him another character, which now stood as a part of the plaintiff's production; but he did not identify that manuscript with the one produced.

On the part of the defendant, it was submitted that this evidence did not satisfy the plaintiff's undertaking.

For the plaintiff, it was insisted that the evidence offered was material, not to prove the authorship of the piece in question, but to shew an act done with the manuscript in the county of *Middlesex*, before the time of the defendant's alleged purchase from *De Hays*.

The learned judge ruled that the plaintiff had given sufficient evidence to satisfy the undertaking.

It was further objected, on the part of the defendant, that the statute 3 & 4 *W. 4. c. 15.* did not extend to the protection of pantomimes, which are not *dramatic entertainments* as ordinarily understood; that it did not apply to the performance of a *part* of a work; and that, to render the defendant liable to the penalties imposed by the act, it was incumbent on the plaintiff to shew that the offence was *knowingly* committed.

The learned judge overruled these objections; and the jury returned a verdict for the plaintiff for 46*l.*, being 40*s.* for each performance.

*M. D. Hill* now moved for a nonsuit, on the ground that the undertaking to give material evidence in *Middlesex*, had not been complied with, or for a new trial, on the other grounds urged at the trial; and also to arrest the judgment, on the ground that the declaration did not allege the performances complained of to have been *public* performances.

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The construction of the undertaking contained in the rule to bring back the venue, underwent considerable discussion in the recent case of *Clark v. Dunsford* (a), where all the authorities are cited, and where the majority of the court held such undertaking to be satisfied by proof of any fact which materially conduces to the establishing of matter which may be in issue, arising in the county to which the cause is restored, or tending to enhance the damages. It was an action brought against the defendant for criminal conversation with the plaintiff's wife; and an act done in *Middlesex*, in furtherance of a plan for hiring lodgings at *Bath* for the purpose of facilitating the commission of adultery there, was held to be a sufficient compliance with an undertaking to give material evidence in *Middlesex*. Assuming that case to lay down the correct rule, here was no evidence whatever in *Middlesex* that was material to any matter in controversy between these parties. [*Maule, J.* Was it matter of controversy at the trial whether the plaintiff was the author of the pantomime, or *De Hays*?] It was the main question. [*Wilde, C. J.* The undertaking is satisfied by evidence tending to confirm evidence already given. The dealing with the manuscript in *Middlesex*, in *October*, 1842, was strong confirmation of its prior existence.] No doubt this might have been made material, if offered as the first link of a chain of proof to corroborate the evidence of the plaintiff's brother as to the authorship. But the question is, whether, standing alone, it satisfies the undertaking.

The first section of the 3 & 4 W. 4. c. 15. gives the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, the sole liberty of representing it, or causing it to be represented, at any place of dramatic entertainment in any part of

(a) *Antè*, Vol. II. p. 724. And see *Hall v. Story*, 16 M. & W. 63.



the *British* dominions: and the second section enacts, that, “if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this act, or right of the author or his assignee, represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, *at any place of dramatic entertainment* within the limits aforesaid, any such production as aforesaid, or any part thereof, every such *offender* shall be liable, for each and every such representation, to the payment of an amount not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author or other proprietor of such production so represented contrary to the true intent and meaning of this act, to be recovered, together with double costs of suit, by such author or other proprietors, in any court having jurisdiction in such cases in that part of the said united kingdom, or of the *British* dominions, in which the offence shall be committed; and, in every such proceeding, where the sole liberty of such author or his assignee as aforesaid shall be subject to such right or authority as aforesaid, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, or otherwise mentioning the same.” Pantomimes are not mentioned in this act, though they are mentioned in the twenty-third section of a statute which is *in pari materia*, viz. the 6 & 7 *Vict. c. 68.*: and they clearly do not fall within the description of “dramatic entertainments.” The act, being penal, is to be construed strictly. In *The King v. Handy*, (a) the defendant having been convicted in the penalty of 50*l.*, under the statute 10 G. 2.

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c. 28. (a) for “acting, representing, and performing a certain entertainment of the stage called tumbling,” &c., at *Birmingham*, in an amphitheatre erected for that purpose; the conviction was removed to the court of King’s Bench by *certiorari*, in order to take the opinion of the court on the question, whether the offence came within the statute. In the course of the argument was cited a case of *Gallini v. Laborie* (b), where Lord *Kenyon* had held that the statute extended to *dancing* and “every other species of stage entertainment.” The same learned judge, however, said: “The decision in the case alluded to, of *Gallini v. Laborie*, was perfectly right, because that clearly came within the statute 25 G. 2. c. 36. But, if I expressed myself, as has been now represented, that the statute 10 G. 2. extended to every species of stage-entertainment, I think I was mistaken: in that case it was not necessary to consider that act so particularly as it is in the present case; and, our immediate attention being now called to it, I do not think that *tumbling* is an entertainment of the stage within the meaning of that act of parliament; it might equally be said that *fencing* on a public stage is. By the 3rd section of this act, a copy of the piece to be represented is required to be sent to the Lord Chamberlain for his approbation previous to the acting: but no copy could have been given of this entertainment. This is a penal act of parliament; and we cannot extend it to enter-

(a) By sect. 2. it is enacted, that, if any person, &c., without such authority or licence as aforesaid (which is explained by s. 1. to mean letters patent from the king, or licence from the lord chamberlain), shall act, represent, or perform, for hire &c., any interlude, tragedy, comedy, opera, play, farce, or other entertainment of the stage,

or any part or parts therein, he shall forfeit for every such offence the sum of 50*l*. And sect. 3. enacts that no person shall act, &c., for hire, any new interlude, &c., unless a true copy thereof be sent to the lord chamberlain fourteen days before the acting, &c.

(b) 5 T. R. 242.



tainments that did not exist when the statute was made." This act only protects integral and complete works. Suppose a dramatic piece, the joint production of two dramatists,—like the works of *Beaumont* and *Fletcher*,—were represented without authority, how would the penalty be divided?

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The intention of the act was, to protect authors against *offenders*. Can a man be an *offender*, who honestly buys an article that is not purchasable in market overt? The same construction must be put upon this act as if the penalty had been 500*l.*, or transportation. *Actus non facit reum, nisi mens sit rea.* (a) In *The King v. Marsh* (b), which was an information on the 5 *Ann. c. 14. s. 2.* against a carrier for having game in his possession *as carrier*, it seems to have been assumed that the defendant would have been excused if he could have shewn that the alleged offence was unknowingly committed. In *Paley on Convictions* (c), it is said, that, "If one of the ingredients required by the statute be the *knowledge* of the party, nothing short of a direct averment to that effect, is sufficient. Thus, in a conviction on the 36 *G. 3. c. 60. s. 2.*, which prohibits persons from putting the word *gilt* upon metal buttons, *knowing the same not to be gilt*, the information charged that the defendant, on the day and at the place therein mentioned, did *unlawfully and fraudulently* put and place for sale a certain number of metal buttons, having stamped thereon the word *gilt*, the said metal buttons not being *gilt*, &c., contrary to the statute. The conviction was quashed, on the ground that the defendant was not charged with having exposed to sale the buttons marked *gilt*, *knowing that they were not gilt*. The court considered the fact of knowledge as an essential con-

(a) 3 *Inst.* 107.

(c) 3rd edit. p. 93.

(b) 2 *B. & C.* 717., 4 *D. & R.* 260.



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stituent of the offence, and not supplied by the words *unlawfully, fraudulently, and against the form of the statute*; which were not deemed equivalent to ‘knowingly.’ It seems indeed, to have been the opinion of *Lawrence, J.*, that, if the words used had been so equivalent, the conviction might have been supported. (a) But, where the word ‘knowingly’ is not introduced into the statute creating the offence, there the *scienter* need not be alleged in the information; but it lies on the defendant to shew such a degree of ignorance as will excuse him.” (b) In *Earl Spencer v. Swannell* (c), it was held that an action of debt for penalties for not setting out tithes, on the stat. 2 & 3 Ed. 6. c. 13. is a penal action within the 21 Jac. 1. c. 4. s. 4., and therefore the new rules as to pleading do not apply to such a case, and that *nil debet* is still a good plea to such an action. (d) So, this act is a penal one.

As to the arrest of judgment. There are many cases in which a description of the alleged offence, in a declaration or a conviction, in the precise words of the statute creating the offence, will not be enough. In *Fletcher v. Calthrop* (e), the defendant justified in trespass for assault and false imprisonment, under a conviction which set forth that C. did, by night, “unlawfully enter certain inclosed land, with a net, for the purpose of taking game, to wit, partridges and pheasants, contrary to the statute, &c.; and the conviction was held bad, for not stating the intent to be to take game *there*. Lord Denman, in delivering the judgment of the court, observes: “The rule laid down in *Paley on Convictions* (g), that it is sufficient to follow the words of the act unless the offence be of a complicated nature, is

(a) *The King v. Jukes*, 8 T. R. 536.

(b) Citing *The King v. Marsh*, *ubi supra*.

(c) 3 M. & W. 154.

(d) And see 7 M. & G. 482 (a).

(e) 6 Q. B. 880.

(g) 3rd edit. p. 108.



open to two objections. It does not rest on any authority; nor does it furnish any criterion by which the justice of peace or this court can discover what cases are thus complicated." And, after referring to *The King v. Marsh* and *James v. Phelps* (a), he adds: "But *Regina v. Corden* (b) is a distinct and pointed authority for the proposition that the words of the act are not universally all that must appear on a conviction. There, the charge was for fishing in a pond. It was held naught, for want of negation of the owner's consent. The same argument which is here resorted to would have supplied that defect, and was pressed on the court; who said, however, 'The offence intended in this conviction, is, fishing in the fishery of Mr. Hayne, being private property. But all this might be done, for aught that appears upon this conviction, with the consent of the owner. The fact ought to appear, so that the court may be able to judge whether the conviction be agreeable to law. If the owner had been the complainer, that would have shewn his dissent (c): but this conviction is upon the complaint of *Martha Buxton*; and it does not appear that the defendant has been guilty of fishing in any water being private property, without the consent of the owner.' As in that case the consent of the owner was required to be negatived in the conviction, so, in the present, the necessity of its alleging an intent to kill game *there*, is deduced from the enormous consequences which would otherwise follow." And, in conclusion, his lordship says: "This principle is well expressed on a similar though not exactly the same occasion, in *Rex v. Baines* (d) 'And proceedings in cases of this nature, which are to deprive a man of his freehold in a summary way, without letting him be tried

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(a) 11 A. & E. 483., 3 P. & D. 231.

(b) 4 Burr. 2279.

(c) At the time of complaining.

(d) 2 Lord Raym. 1265. 1269.



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by his peers, are always construed strictly, and never supplied by intendment of matter which don't appear on the face of them." The representation spoken of in the 2nd section of the act, clearly means a *public* representation. And the circumstance of its being averred to have taken place at "a certain place of dramatic entertainment," makes no difference. Consistently with the statement here, the representations may have been mere rehearsals. In *Chaney v. Payne (a)*, it was held that a conviction under the 70th section of the pilot act, 6 G. 4. c. 125., for "*continuing*" in charge of a ship after a duly licensed pilot had offered to take charge of her, is bad, if it do not shew that the offer was made to, or in the presence of, the party in charge of the vessel, or that it otherwise came to his knowledge. See also the cases cited in *Ransom v. Dundas (b)*, to the same effect.

WILDE, C. J. The court is of opinion that no rule should be granted in this case. The first point made, is, that the plaintiff ought to have been nonsuited, inasmuch as he had failed to comply with his undertaking to give material evidence in the county of *Middlesex*. The evidence given was, that the composition the representation of which is the subject of this action, was, in *October*, 1842, offered in *Middlesex* to the proprietor of a theatre there, for sale, on the part of the plaintiff. It is true there was something like evidence previously given of authorship in *Surrey*; and one of the plaintiff's witnesses deposed to his having heard him there repeat two lines, as if reading from a paper which he held in his hand, which paper was not produced or identified. It is said, however, that this, coupled with the previous evidence of the plaintiff's brother, that he had seen the

(a) 1 *Gale & D.* 348.

(b) 3 *Scott*, 462. 463.



work in the plaintiff's possession in *Surrey* in the years 1838 and 1839, clearly established his authorship. The plaintiff might, undoubtedly, if he had pleased, have gone to the jury on that evidence. But he was not bound, nor do I think it would have been prudent, so to do. He was perfectly justified in seeking to confirm it, by shewing, in *Middlesex*, a person in possession of a manuscript containing the lines which the other witness had heard repeated in *Surrey*. Can there be a doubt that that was strong evidence in confirmation of what had gone before? It clearly was relevant and material to the maintenance of the issue. It is now admitted, that, to satisfy this undertaking, it is not necessary that the evidence should be essential to the maintenance of the action: but it must, in some material degree, conduce to the establishing the matter in issue, or to shew the extent of the injury. The courts have never considered these undertakings as very material to the merits of the case. Many of the cases have been made to turn upon very nice and subtle distinctions. Evidence which is not necessary, may, in many ways, be *material*. If it in any material degree confirms evidence arising elsewhere, it is enough.

The next point insisted on was, that the production in question,—a pantomime,—is not within the protection of the act. The statute professes to protect “any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author or his assignee.” It is said that pantomimes are not expressly mentioned in the act, and that this is not an *entire* work; and a difficulty has been suggested as to the recovery and apportionment of penalties for representing a play, the joint production of two dramatists. That, however, is not the case now before us: for, it is not correct to say that the work in question is not an entire piece. It does not

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appear that the author proposed to add any thing to it. It was complete as far as he was concerned : and, indeed, so far perfect was it, that the defendant played it precisely as the plaintiff had composed it. It was intended merely as an introduction to what is called, in theatrical parlance, “the comic business,” the tricks of the pantomime. That it was valuable property, is shewn by the defendant’s buying it. As far as we can collect the meaning of the statute, it seems to us to be a dramatic piece, of the description the act was meant to protect.

Then, it is said, that the defendant, who appeared to have *bonâ fide* purchased the work from one *De Hays*, in ignorance of the plaintiff’s right, is not an *offender*, and consequently is not liable in this penal action. Whether the act is penal or not, it has but one object in view, viz. to protect the author, by inflicting a forfeiture on persons guilty of piracy. The second section enacts that, “if any person shall, contrary to the intent of the act, or right of the author, &c., represent, or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment within the limits of the act, any such production as aforesaid, or any part thereof, every such offender shall be liable, for each and every such representation, to the payment of an amount not less than 40s., or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom,—whichever shall be the greater damages, — to the author or other proprietor of such production so represented contrary to the true intent and meaning of the act, to be recovered, together with double costs of suit, by such author or other proprietors, in any court having jurisdiction in such cases in that part of the united kingdom, &c., in which the offence shall be committed.” The difficulty of taking the account at *nisi prius*, of the bene-



fit arising to the one party, or the loss to the other, from the representation, would render the act altogether illusory if the penalty were to be regulated solely by that: therefore the statute has very wisely given the author the option of suing for the 40s. penalty. The object of the legislature was, to protect authors against the piratical invasion of their rights. In the sense of having committed an *offence against the act*, of having done a thing that is prohibited, the defendant is an *offender*. The plaintiff's rights do not depend upon the innocence or guilt of the defendant. It seems to us, therefore, that this pantomime is within the protection of the act, that the now defendant is an offender, and that the allegation and proof of a *scienter* were not necessary to entitle the plaintiff to such protection. The statute would altogether fail to effect its object, if it were necessary to shew that the defendant had a knowledge of the plaintiff's right of property.

The motion in arrest of judgment is equally without foundation. The statute prohibits the representation, without the consent of the author or proprietor, "at any place of dramatic entertainment." The legislature clearly meant places where dramatic entertainments are represented to which the public are admitted. And what the legislature meant in the statute, the plaintiff must be taken to have meant in his declaration. The declaration substantially alleges that the defendant, in violation of the statute, has, without his consent, caused his piece to be exhibited at a place of dramatic entertainment; and that allegation is sustained by shewing a public representation in a licensed theatre. There is no suggestion now that the evidence did not sustain the charge. Several cases were cited for the purpose of shewing that it is not always sufficient to describe an offence in the words of the statute creating it. They all, however, were cases of summary convictions by

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courts of limited jurisdiction. I apprehend that the rule which governs cases of that description has no application here.

For these reasons we think that the defendant is not entitled to a rule upon either of the grounds upon which he has relied.

Rule refused. (a)

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(a) PARRATT v. BENASSIT.

In an action by *A.*, an agent employed by *B.* to cause advertisements to be inserted in newspapers, evidence that *A.* gave orders to *C.* to insert such advertisements, is material evidence in the county in which such orders were given, to satisfy an undertaking upon bringing back the venue.

ASSUMPSIT, by an advertising agent, against a member of the managing committee of a projected railway company. The venue, which had been removed from *Warwickshire* to *London* upon the ordinary affidavit, was restored to the county of *Warwick* upon an undertaking by the plaintiff to give material evidence there.

At the trial before *Patterson, J.*, at the last assises for *Warwick*, the plaintiff, in order to satisfy his undertaking, proved that he, being employed by the company to cause advertisements to be inserted in certain newspapers, employed one *Thomas*, in *Warwick*, to procure one to be inserted in a newspaper circulating in the county of *Warwick*.

A verdict having been found for the plaintiff, damages 1100*l.*

*Whitehurst* now moved, pursuant to leave reserved to him, to enter a nonsuit, on the ground that the evidence so given, did not satisfy the undertaking. He submitted that the new contract made by the plaintiff with *Thomas*, was not material to the issue between these parties and that any thing done by *Thomas*, could not be a compliance with the undertaking.

*Per curiam.* We are clearly of opinion that the evidence given did satisfy the plaintiff's undertaking.

Rule refused.



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## CHADWICK v. HERAPATH.

Jan. 27.

CASE, for a libel.

Plea, that the plaintiff ought not further to maintain his said action, because the defendant says that the libel in the declaration mentioned, was, before and at the time of the committing of the several grievances in the declaration mentioned, and after the passing and coming into operation of an act passed in the 6th year of the now Queen, to amend the law respecting defamatory words and libel, contained in a public newspaper, to wit, in *Herapath's Railway and Commercial Journal*; that the said libel was then inserted in the said newspaper without actual malice, and without gross negligence: And the defendant further says, that, after the publication thereof, and after the committing of the same grievances, and before the commencement of this action, to wit, on &c., he duly inserted in a public newspaper, to wit, another part of the publication of the said newspaper called *Herapath's Railway and Commercial Journal*, a full apology for the said libel, according to the form of the said statute in such case made and provided: And the defendant now brings into court here the sum of 5*l.* ready to be paid to the plaintiff by way of amends for the injury sustained by the publication of the said libel as aforesaid, and the causes of action in the declaration mentioned: And the defendant further says that the

By the late libel act, 6 & 7 Vict. c. 96. s. 2., a defendant may plead that the libel was inserted in a newspaper without actual malice, and without gross negligence; and that he inserted a full apology; and may pay money into court by way of amends.

The clause further enacts "that, to such plea to such action, it shall be competent to the plaintiff to reply generally, denying the whole of such plea: — Held, that, under that section, a plaintiff is at liberty to deny the whole, or any

of such a plea; and that a replication which admitted that the libel was inserted in a newspaper, and the payment of money into court, and traversed the truth of the libel without actual malice, and without gross negligence, and the sufficiency of the money paid into court as amends, was good.



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plaintiff has not sustained damages to a greater amount than the said sum of money last mentioned in respect of the said publication, and the causes of action in the declaration mentioned — verification.

Replication, that the said libel was not inserted without actual malice, and without gross negligence, in manner and form as in the plea alleged; nor did the defendant insert a full apology for the said libel according to the form of the said statute in such case made and provided, in manner and form in the said plea in that behalf alleged; that the plaintiff had sustained damage to a greater amount than the said sum of 5*l.* in respect of the said publication, and the causes of action in the declaration mentioned — concluding to the country.

Special demurrer, assigning for causes, that the replication was bad at common law, because it was cumulative, double, and multifarious, in traversing conjointly three distinct and separate allegations, viz. that the said libel was inserted without actual malice, and without gross negligence, that the defendant inserted a full apology for the said libel according to the form of the said statute in such case made and provided, and that the plaintiff had sustained damages to a greater amount than the said sum of 5*l.* paid by the defendant into court; that the replication traversed in the negative, matter which ought to have been traversed in the affirmative, in this, that it alleged that the said libel was not inserted without actual malice, and without gross negligence, which several negative allegations made an informal, improper, and argumentative pleading and issue, and the aforesaid negative allegations in the said plea should have been denied by positive affirmative matter, and this whether the replication was to be considered one at common law, or was framed under and by virtue of the statute in such case made and provided; that, if the replication was intended to be pleaded



according to the provisions of the said statute in that behalf, then it was bad, because it should have been so pleaded in express terms, and it should have been alleged therein that it was so pleaded; that this replication was not the general replication given by the statute; that, if the same was pleaded by virtue of the provisions of the statute in that behalf, it was insufficient, in this, that it did not deny the *whole* of the plea, but admitted a part thereof, that is to say, that the libel was contained in the public newspaper therein mentioned, &c.

Joinder in demurrer.

*Bovill*, in support of the demurrer. The question is as to the validity of the replication. The plea is framed in accordance with the provisions of the 2nd section of the late libel act, 6 & 7 *Vict. c. 96. (a)* The replication

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(a) Which enacts, "that, in an action for a libel contained in any public newspaper or other periodical publication, it shall be competent to the defendant to plead that such libel as inserted in such newspaper or other periodical publication without actual malice, and without gross negligence, and that, before the commencement of the action, or at the earliest opportunity afterwards, he inserted in such newspaper or other periodical publication, a full apology for the said libel; and if the newspaper or periodical publication in which the said libel appeared, should be ordinarily published at intervals not exceeding one week, had offered to publish the said apology in any newspaper or periodical publication to be selected by the plaintiff in such action;

and that every such defendant shall, upon filing such plea, be at liberty to pay into court a sum of money by way of amends for the injury sustained by the publication of such libel; and such payment into court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of the additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from the personal actions in which it is lawful to pay money into court, under an act passed in the session of parliament, held in the fourth year of his late Majesty, intituled 'An act for the further



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is clearly bad at common law for duplicity; but, by that section, the plaintiff may “reply generally, denying the *whole* of such plea.” It is submitted, however, that, in order to avail himself of that power, a plaintiff must adhere to it strictly, and he ought in this case to have traversed the *whole* of the matters alleged in the plea, and it is not competent for him to deny only part. Here, there are two allegations in the plea, namely, that the libel was contained in a public newspaper, and the bringing of the 5*l.* into court, which are not denied in the replication (a). In *Leaf v. Robson* (b) the court of Exchequer held a plea to be bad, under the insolvent act 5 & 6 *Vict. c.* 116, that did not strictly pursue the form given by that statute. [*Maule, J.* In that case the act virtually prescribed the form of the plea: here, the statute by no means gives a form. The point raised in *Leaf v. Robson* came before this court in *Gillon v. Deare* (c).] Under the express words of this act, the plaintiff is bound to deny the *whole* of the plea. [*Maule, J.* Is not the meaning of the act, that the plaintiff may deny the whole or any part of the plea? I have no doubt as to the construction of the act. The words, “it shall be competent to the plaintiff to reply generally, denying the whole of such plea,” mean, that he shall be at liberty to deny the whole, if he thinks proper.] To depart from the plain words might lead to great inconvenience. The next point is, whether the plaintiff, in denying the plea, must not pursue the correct form of pleading. Here, the allegation of malice is denied in the form of two negatives. The plaintiff, in order to sustain his action for libel, is bound to make out malice.

amendment of the law, and the better advancement of justice; and that to such plea to such action, it shall be competent to the plaintiff to reply generally, *denying the whole of such plea.*”

(a) *Quære*, whether the contemporaneous recording—the *process-verbal*—of the act of paying money into court, is a traversable *allegation*.

(b) 13 *M. & W.* 651.

(c) *Antè*, Vol. II. p. 309.



[*Maule, J.* It is clear that the malice mentioned in the declaration is not that malice which is negatived by the plea. *Cresswell, J.* The object of your demurrer is, to change the burthen of proof from the defendant to the plaintiff. *Maule, J.* The plea does contain an affirmative, and the replication a negative, — as to the insertion of the libel without actual malice, and without gross negligence.] The insertion of the libel is admitted on both sides; the traverse relates to the malice and gross negligence. [*Wilde, C. J.* The traverse is on the insertion of the libel in a qualified manner. It is a compound proposition.]

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*Per curiam,*

Judgment for the plaintiff.

RICKETTS and Others v. JANE BOWHAY, Executrix of JOHN-HAYE BOWHAY, deceased, and Others.

Jan. 20.

**J**UDGMENT having been obtained by the plaintiffs for 3045*l.* 2*s.* 9*d.*, in an action against one *Jonathan Clouter*, one of the registered public officers of *The* The fact of a *scire facias*, to charge a party as a member of a banking

co-partnership, under the 7 *G. 4. c. 46. s. 13.*, having been issued without leave of the court, in a case where such leave is necessary, or being ambiguous on the face of it, is a mere irregularity, to be taken advantage of on motion, and promptly.

But, where the writ stated that *A. B.* and *C. D.* “*were at the time of the judgment and still are*” members of the co-partnership, and prayed execution against them; and the declaration recited a *scire facias*, charging them as executrix and administrator respectively of persons who were members *at the time of their respective deaths* (which took place before the judgment), and praying execution of the goods and chattels of the deceased in the hands of *A. B.* and *C. D.* as executrix and administrator to be administered: — Held, that this misrecital was a substantial variance, the right to take advantage of which was not waived by the garnishees’ obtaining orders for time to plead.

*Quære* whether under this statute recourse can be had to the estates of deceased members of the co-partnership.



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*Western - District - Banking - Company - for - Devon - and - Cornwall*, a *scire facias* was sued out pursuant to the 7 G. 4.c. 46.s. 13. (a) in order to obtain execution against *Jane Bowhay, James-Bennett Job, and Richard-Osman Job*, tested the 20th of *April*, 1846. The writ was as follows: —

“*Victoria, &c.*, to the sheriffs of *London*, greeting: Whereas *F. Ricketts, T. James, and H. J. Enthoven*, lately, to wit, on the 7th of *January*, 1845, in Our court, before *Sir N. C. Tindal*, knight, our chief justice, and his companions, Our justices of the bench at *Westminster*, under, and by virtue of, the statute in such case made and provided, by the judgment of the same court recovered against *Jonathan Clouter*, one of the present registered public officers of certain persons united in

(a) Which enacts, “that execution upon any judgment in any action, obtained against any public officer, for the time being, of any such corporation or co-partnership carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members, for the time being, of any such corporation or co-partnership; and that, in case any such execution against any member or members for the time being of any such corporation or co-partnership, shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being, to issue execution against any person or persons who was or were a member or members of

such corporation or copartnership at the time when the contract or contracts, or engagement or engagements, in [on] which such judgment may have been obtained, was or were entered into, or became a member or members at any time before such contracts or engagements were executed, or was a member at the time of the judgment obtained: provided always, that no such execution as last mentioned shall be issued without leave first granted, on motion in open court, by the court in which such judgment shall have been obtained, and when [which] motion shall be made on notice to the person or persons sought to be charged; nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or co-partnership.”



co-partnership and carrying on the trade and business of bankers in *England*, in the name of *The Western-District-Banking-Company-for-Devon-and-Cornwall*, under and by virtue of and according to the form and effect of an act of parliament made and passed, &c., intitled, &c., and that the said *Jonathan Clouter* had been then duly nominated, appointed, and registered as such public officer, and was then sued for and on behalf of the said company, according to the form and effect of the said act of parliament in such case made and provided, 3045*l.* 2*s.* 9*d.*, for their damages which they had sustained, as well on occasion of the not performing of certain promises then lately made by the said company to the said *Ricketts, James*, and *Enthoven*, as for their costs and charges by them about their suit in that behalf expended, whereof the said *J. Clouter* is convicted, *prout patet*, &c.: and now, on behalf of the said *Ricketts, James*, and *Enthoven*, in our same court, we are informed, that, although judgment was thereupon given, yet execution of the damages aforesaid, still remains to be made to them; and we are also informed on behalf of the said *Ricketts, James*, and *Enthoven*, in our same court, that *Jane Bowhay, executrix of the last will and testament of John-Haye Bowhay, deceased*, and *James-Bennett Job* and *Richard-Osman Job, administrators with the will annexed of the effects of Hugh Job, deceased*, before and at the time of the recovering and giving of the said judgment were, and from thence hitherto have been and still are, members of the said co-partnership; wherefore the said *Ricketts, James*, and *Enthoven* have humbly besought us to provide them a proper remedy in this behalf; and We, being willing that those things which in Our same court are rightly done, should be duly carried into execution, and that what is just in this behalf should be done, command you, that, by honest and lawful men of your bailiwick, you make known to the said *Jane Bowhay, executrix as aforesaid*, and *J. B. Job*, and *R. O.*

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On the 24th of *October*, in the same year, a declaration was delivered to the respective parties, as follows:—

“*London*, to wit. The sheriffs of *London* were commanded, whereas, *F. Ricketts, T. James, and H. J. Enthoven*, lately, in the court of our lady the Queen here, to wit, on the 7th of *January*, 1846, before, &c., under and by virtue of the statute in such case made and provided, by the judgment of the same court, recovered against *J. Clouter*, one of the then present registered public officers of certain persons united in co-partnership and carrying on the trade and business of bankers in *England*, in the name of *The Western-District-Banking-Company-for-Devon-and-Cornwall*, under and by virtue of, and according to the form and effect of, an act of parliament made and passed, &c., intituled, &c., and which said *J. Clouter* had been then duly nominated, appointed, and registered, as such public officer, and was then sued for and on behalf of the said company, according to the form and effect of the said act of parliament in such case made and provided, 3045*l.* 2*s.* 9*d.*, for their damages, &c., whereof



the said *J. Clouter* was convicted, *prout patet*, &c. ; and then, on behalf of the said *Ricketts, James, and Enthoven*, in Her Majesty's same court, Her Majesty was informed, that, although judgment was thereupon given, yet execution of the damages aforesaid then still remained to be made to them ; and *Her Majesty* was also then informed, on behalf of the said *Ricketts, James, and Enthoven*, in her same court, that *John-Haye Bowhay, and Hugh Job*, since deceased, before and at the time of the recovering and giving of the said judgment, were, and each of them was, and from thence continually up to and until and at the time of their respective deaths hereinafter mentioned, remained, members of the said co-partnership ; and *Her Majesty* was also then informed, on behalf of the said *Ricketts, James, and Enthoven*, in Her same court, that afterwards, and after the giving and recovering of the judgment aforesaid, and whilst the said *John-Haye Bowhay* remained and continued such member of the said co-partnership, and before execution made upon the said judgment so recovered as aforesaid, to wit, on the 21st of October, 1840, the said *John-Haye Bowhay* died, having first duly made and published his last will and testament, and thereby constituted and appointed *Jane Bowhay* executrix thereof, after whose death, and before any execution made upon the said judgment so recovered as aforesaid, the said *Jane Bowhay* duly proved the said last will and testament of the said *John-Haye Bowhay*, and took upon herself the burthen of the execution of the same ; and *Her Majesty* was also then informed, on behalf of the said *Ricketts, James, and Enthoven*, in her same court, that afterwards, and after the giving and recovering the judgment aforesaid, and whilst the said *Hugh Job* remained and continued such member of the said co-partnership, and before execution made upon the said judgment so recovered as aforesaid, to wit, on the 22nd

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*of October, 1844, the said Hugh Job died, after whose death, and before execution upon the said judgment so recovered as aforesaid, to wit, on the 12th of September, 1845, administration of all and singular the goods, chattels, and credits which were of the said Hugh Job, deceased, at the time of his death, by William, by Divine Providence Archbishop of Canterbury, primate of all England, and metropolitan, in due form of law was granted to James-Bennett Job and Richard-Osman Job, with the last will and testament of the said Hugh Job annexed; as by the information of the said Ricketts, James, and Enthoven, in Her said Majesty's court, Her said Majesty had been given to understand; wherefore the said Ricketts, James, and Enthoven had humbly besought Her said Majesty to provide them a proper remedy in that behalf, and Her Majesty, being willing that those things which in her same court are rightly done should be duly carried into execution, and that what was just in that behalf should be done, commanded the said sheriffs of London, that, by honest and lawful men of their bailiwick, they should make known to the said Jane Bowhay, executrix of the said John-Haye Bowhay as aforesaid, and the said J. B. Job and R. O. Job, administrators of the said Hugh Job as aforesaid, that they and each of them should be before Her Majesty's justices at Westminster, on the 1st of May, 1846, to shew if they had or knew, or if any or either of them had or knew, of anything to say for themselves, himself, or herself, why the said Ricketts, James, and Enthoven ought not to have execution against the said Jane Bowhay, executrix of the said John-Haye Bowhay as aforesaid, and J. B. Job, and R. O. Job, administrators of the said Hugh Job as aforesaid, of the damages as aforesaid, to be levied of the goods and chattels which were of the said John-Haye Bowhay and Hugh Job respectively, at the time of their deaths respectively, in the hands of the*



*said Jane Bowhay as executrix as aforesaid, and of the said J. B. Job and R. O. Job, as administrators as aforesaid, to be administered, according to the force, form, and effect of the said recovery, and of the statute in such case made and provided, if it should seem expedient for them so to do; and further to do and receive what Her Majesty's said court should then and there consider of them in that behalf, &c. And now here at this day come the said Ricketts, James, and Enthoven, by F. E., their attorney, and offer themselves on the fourth day against the said Jane Bowhay, executrix as aforesaid, and the said J. B. Job and R. O. Job, administrators as aforesaid, in the plea aforesaid; and the sheriffs of London, to wit, J. L. and W. J. C., Esquires, sheriffs of London aforesaid, now here return that the said Jane Bowhay, executrix as aforesaid, and the said J. B. Job and R. O. Job, administrators as aforesaid, have nothing in their bailiwick whereby or by which they can make known to them as by the said writ they are commanded, nor is the said Jane Bowhay, executrix as aforesaid, nor are the said J. B. Job and R. O. Job, administrators as aforesaid, nor are any nor is either of them, found in the same. And the said Jane Bowhay, executrix as aforesaid, being solemnly demanded, by H. W. S., her attorney, comes, and the said J. B. Job and R. O. Job, administrators as aforesaid, being also demanded, by G. F., their attorney, also come. And thereupon the said Ricketts, James, and Enthoven, pray that execution may be adjudged to them against the said Jane Bowhay, as such executrix as aforesaid, and against the said J. B. Job and R. O. Job, as such administrators as aforesaid, of the damages aforesaid, to be levied of the goods and chattels which were of the said John-Haye Bowhay and Hugh Job, respectively, at the time of their deaths respectively, in their hands to be administered, according to the force,*

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form, and effect of the said recovery, and of the statutes in such case made and provided," &c.

This declaration was indorsed with a notice to plead thereto in eight days, and with a demand of plea. On the 2nd of *November*, 1846, an order was obtained on behalf of *J. B. Job* and *R. O. Job*, for ten days' time to plead, "pleading issuably, rejoining gratis, and taking short notice of trial;" and, on the 13th, a second order was obtained by them for a week's further time to plead, "pleading issuably, without prejudice to any application to set aside the declaration, as being inconsistent with the writ." Three orders for time to plead had also been obtained on behalf of *Jane Bowhay*, the last being "without prejudice to any application to set aside the proceedings for irregularity."

*John-Hay Bowhay*, the testator, died on the 21st of *October*, 1840; and *Hugh Job*, the intestate, on the 20th of *October*, 1844; both having been members of the co-partnership at the time of their respective deaths.

It did not appear when the debt was contracted. But the co-partnership was dissolved on the 14th of *August*, 1844, and the judgment against *Clouter*, one of the public officers, was obtained on the 7th of *January*, 1845. No execution had issued against any of the shareholders.

Upon affidavits detailing these facts, and alleging that the *scire facias* was sued out without leave of the court, and without any previous notice to the parties,

Nov. 14. 16.  
1846.

*M. Smith*, in *Michaelmas* term, last on behalf of *James Bennett Job* and *Richard-Osman Job* and *Jane Bowhay*, respectively, obtained rules nisi to set aside the *scire facias*, the declaration, and all subsequent proceedings, or the declaration and subsequent proceedings. He submitted, that, although, in ordinary cases, the obtaining an order for time to plead, waives an irregularity in pro-



cess or declaration, that rule could not be applied to a case of this description, where the writ was altogether a nullity, and the declaration, without a writ to warrant it. He referred to *Cross v. Law* (a), *Whittenbury v. Law* (b), and *Eardley v. Law* (c),

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*Channell*, Serjt., shewed cause. That which is complained of is mere irregularity, and is waived by obtaining time to plead, upon the terms on which time is uniformly granted.

Jan. 16.

The first objection relied on to support the rules, is, that this *scire facias* issued without the leave of the court. The thirteenth section of the statute enables a creditor having obtained judgment against the public officer of a banking co-partnership, to issue execution against three classes of persons — first, members for the time being — secondly, members at the time when the contract was entered into — thirdly, members at the time of the judgment obtained. As against the last two classes, the leave of the court is necessary before a *scire facias* can issue; but no leave is required for the issuing of a writ against members of the first class, within which these parties fall. [*Maule*, J. This writ is ambiguous on the face of it: as expounded by the declaration, it appears that the plaintiffs seek to have recourse against the estates of persons who were members of the co-partnership at the time of the contract, but who were not members at the time of the judgment.] The writ is at all events good upon the face of it. And, suppose leave of the court was necessary, the issuing the writ without it is only an irregularity. In *Bradley v. Warburg* (d), by an act of parliament (e) incorporating *The Patent-*

(a) 6 *M. & W.* 217., 8 *Dowl.*  
C. 789.

(b) 6 *N. C.* 345., 8 *Scott*,  
63.

(c) 12 *Ad. & E.* 802.

(d) 11 *M. & W.* 452.

(e) 4 & 5 *Vict. c.* lxxxix.



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*Rolling-and-Compressing-Iron Company*, it was provided that every judgment against the nominal defendant might be executed against the person and estate of every shareholder, provided "that no such execution should issue without leave first granted by the court in which such judgment should have been obtained, upon motion in court, and after notice of motion:" and it was held that the circumstance of a *scire facias* having issued without the leave of the court, could not be pleaded as a defence in bar of the action, but was an irregularity merely, for which an application might be made to the court to set aside the writ. Supposing, therefore, this writ to have been irregularly issued, that objection has been waived by the laches of the parties.

The declaration does, in some unimportant respects, differ from the writ. The writ states that *Jane Bowhay* and the two *Jobs* were at the time of the judgment, and still are, members of the co-partnership, and prays execution against them; and, though it adds their representative character, it does not seek to charge them in that character. The declaration states that the testator and intestate were at the time of the judgment, and thence until their respective deaths remained, members: it then states their deaths, and the grant of probate and letters of administration to *Jane Bowhay* and the two *Jobs* respectively; and prays execution against the goods and chattels of the testator and intestate. [*Maule, J.* Upon this writ, the plaintiffs might have declared either against the estates of the testator and intestate, or against these parties as present shareholders. They have elected the former course. It is consistent with the declaration that the shares of the deceased persons never came to their representatives.] There can be no objection to suing out the writ generally, and declaring in a more limited manner. Suppose the writ is good, the variance between it and the declaration may be



matter of error; and the court will, if there be any doubt, leave the parties to that remedy. [*V. Williams, J.* It is not mere matter of form. Do the representatives of deceased shareholders become members of the co-partnership at all?] That consideration may introduce a difficulty as to the declaration, and may make it important to preserve the writ.

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*M. Smith*, in support of the rules. An executor or an administrator cannot, as such, do any act to make himself a partner in a joint-stock company: it was so decided by Lord *Langdale*, M. R., in the recent case of *Barker v. Buttress*. (a)

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The writ, as issued, did not necessarily require the leave of the court. But, taking the declaration as expounding the writ, the necessity for a previous application to the court is made apparent. The objection to the writ is not mere form: it goes to the very substance of the matter. A party moving for a *scire facias* in order to have execution against former members of a banking company, on a judgment against the registered public officer, must shew that he has made substantial and *bonâ fide* endeavours to obtain an available execution against the present members; and the court will decide, on the motion, whether sufficient diligence has been used in the particular case: *Eardley v. Law*. (b) *Coleridge, J.*, there says: "The statute distinguishes between the class of persons primarily, and the class secondarily, liable. The last are to be called upon only after certain proceedings have been taken against the first. Mr. *Wightman* was compelled to admit, that, according to his view, the proceedings against the first were to be taken almost *pro formâ*. But that stultifies the act. It is clear, that, for proceeding

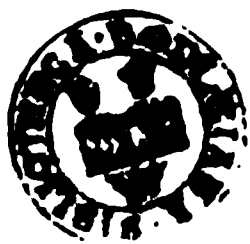
(a) 7 *Beavan*, 134.see *Field v. Mackenzie*, *post*,(b) 12 *Ad. & E.* 802. And Vol. IV.



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against the second class of persons, leave must be obtained from the court; but, if, to warrant the proceeding, a formal act only, and nothing substantial, were required, the provision as to leave would be unnecessary. Something real must have been done, and *bonâ fide*, before a plaintiff can ask for his remedy against the persons secondarily liable." Here, the declaration introduces a totally different liability from that mentioned in the writ, and shews that the parties now sought to be charged, have been deprived of the notice and inquiry the statute intended that they should have. [ *Wilde*, C. J. The question is, whether, by obtaining time to plead, you do not treat the declaration as one requiring a plea.] That undoubtedly would be so in an ordinary case: but it would not be doing substantial justice to apply that rule, in all its strictness, to a case upon this act of parliament.



WILDE, C. J. Considerable difficulty has arisen in this case from the anxiety of the court to do what is just and proper in the particular case, and, at the same time, to avoid infringing a general rule of practice. The effect of taking a step in a cause after notice of an irregularity, and the propriety and duty of promptly taking advantage of a technical objection, have always been considered matters of very considerable importance. Without intending at all to infringe the rule that the obtaining an order for time to plead, operates as a waiver of any irregularity in the writ or the declaration, I think we may, under the peculiar circumstances of this case, grant the relief prayed. The question arises upon a comparatively modern act of parliament, which imposes liabilities, and confers remedies, exemptions, and discharges of an entirely new character; and much difficulty occurs in giving effect to them consistently with the application of the ordinary rules by which the discretion of the court is governed.



The remedies given by the act to persons who have contracted with a joint-stock banking company, are to be pursued against the public officer. A judgment obtained against him is to enure to the effect of giving right to have execution against different classes of persons upon different conditions. The 13th section enacts, "that execution upon any judgment in any action obtained against any public officer for the time being of any such corporation or co-partnership carrying on the business of banking under the provisions of the act, whether as plaintiff or defendant, may be issued against *any member or members, for the time being, of such corporation or co-partnership*: and that, in case of such execution against any member or members, for the time being, of any such corporation or co-partnership all be ineffectual for obtaining payment and satisfaction of the amount of such judgment," upon that condition, and in that case, "it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being, to issue execution against *any person or persons who was or were a member or members of such corporation or co-partnership at the time when the contract or contracts, or engagement or engagements, on which such judgment may have been obtained, was or were entered into, or became a member or members at any time before such contracts or engagements were executed,*"—thus rendering liable persons who would have been liable at common law,—"*or was a member of the time of the judgment obtained,*"—without regard to whether they were partners at the time the contracts were entered into or executed. The clause having given this extraordinary remedy, then proceeds to enact that such execution as *last mentioned* shall be issued without leave first granted, on motion in open court, by the court in which such judgment shall have been obtained, and when [which?] motion shall be made on behalf of the person or persons sought to be charged,

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nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or co-partnership." Under these circumstances, it is obvious that it may not always be very easy to apply to cases arising upon this act, the ordinary rules of law. The legislature has sought to make the remedy co-extensive with the inconvenience intended to be obviated. And, accordingly, the leave of the court is, in certain cases, to be obtained before execution can be issued, and notice is to be given to the party sought to be charged. What notice shall be given, must, of course, be decided by the court. When the parties are before it, the court will inquire within which of the three classes described in the 13th section the persons against whom execution is prayed, fall. Further, the court is charged with the duty of ascertaining that the execution against members of the first class has been ineffectual, before recourse is had to the second and third; that is, that all due means have been taken to obtain satisfaction against the parties primarily liable; before execution is allowed to go against those whose liability only arises on their default. That is a matter which obviously goes to the substantial merits. Let us see what has been done here. The plaintiff, having recovered a judgment against the public officer of *The Western-District-Banking Company*, without any leave of the court, sues out a *scire facias* against *Jane Bowhay*, describing her as "executrix of the last will and testament of *John-Haye Bowhay*, deceased," and against *James-Bennett Job* and *Richard-Osman Job*, describing them as "administrators with the will annexed of the effects of *Hugh Job*, deceased." It may be observed that this writ appears to be framed with studied ambiguity. Though it describes the parties in their representative characters, it does not profess to take a remedy against them in that character, but personally,—leaving the description contained in the writ



apparently immaterial; for, if co-partners or shareholders, it is perfectly immaterial whether they are executrix and administrators or not; their liability being laid as a liability in respect of the membership. If an application had been made by the persons thus sought to be charged, to set aside the writ when so issued, the answer would have been — that they were charged as persons who were members of the co-partnership at the time of the judgment, and who also continued to be members at the time being. No one, therefore, could have felt justified in advising an application to set aside the writ in the first instance. Then comes the declaration. When delivered, what is its form? (a) It professes to recite the writ, but it in truth recites a totally different one: it recites a writ, stating, that *John-Haye Bowhay* and *Hugh Job* were members of the co-partnership in question at the time of the judgment, and remained until the time of their respective deaths; that *John-Haye Bowhay* died after judgment, and before execution, to wit, on the 21st of *October*, 1840, and that his will was duly proved by *Jane Bowhay*, his executrix; and that *Hugh Job* also died after judgment and before execution, to wit, on the 22nd of *October*, 1844, and that administration of his effects was granted to *James-mnett Job* and *Richard-Osman Job*. There is no such writ. The writ originally sued out then alleges that the plaintiffs have prayed Her Majesty to provide them proper remedy, and that thereupon the sheriff is commanded to make known to “the said *Jane Bowhay*, executrix as aforesaid, and *J. B. Job* and *R. O. Job*, administrators as aforesaid,” that they be before the justices on a certain day, to shew cause why execution should not issue *against them*. The writ recited in the declaration, however, now discloses that the plaintiffs

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1) Usually the declaration *verba*, and alleges the sheriff's *ipse facias* does not recite, return, and the appearance of sets out the writ in *hac* the garnishee — defendant.



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seek to charge the parties, not as members of the co-partnership at the time of the contract, or at the time of the judgment, or as members at the time being, whatever that may mean; but it calls upon them to shew cause why execution should not be had against them, of the damages aforesaid — “to be levied of the goods and chattels which were of the said *John-Haye Bowhay* and *Hugh Job* respectively, in the hands of the said *Jane Bowhay*, as executrix as aforesaid, and of the said *J. B. Job* and *R. O. Job*, as administrators as aforesaid, to be administered,” &c. It is to be remembered that a judgment against several partners, one of whom dies, survives against the others: and there is nothing in this act of parliament to alter the effect of the death of a party in this respect. It is now suggested on the part of the defendants, that the purpose and object of this writ, — in itself susceptible of two constructions, — are by the declaration shewn to be, that it should attach upon a construction which rendered necessary a notice that has not been given, and an inquiry which has not been gone into; and that they now for the first time learn, from the explanation and construction put upon the writ by the plaintiffs themselves, that it is defective.

This being, as already observed, a comparatively modern act, and one that has not been much brought under the consideration of the court, — except with regard to the mode of introducing parties on the record, and the mode of taking advantage of an irregularity in issuing a *scire facias* without the leave of the court, where such leave is necessary, — it behoved the parties here called upon, to consider well the course they should pursue. Accordingly, the declaration having been delivered on the 24th of *October*, 1846, they obtained orders for time to plead. Generally speaking, time to plead is obtained upon condition that the plaintiff is not to be embarrassed by any thing that does not go to the substantial merits. All defences of that sort are waived. Can it be con-



tended that the objection relied on in this case, does not go to the merits, because it is not matter of pleading? A general demurrer is held to be consistent with the true construction of the condition to plead issuably, because it must go to the merits of the case. A party is not to be precluded from taking an objection which goes to the merits of the case, though it assumes the form of an irregularity. It seems to me, that the objection to this writ is well founded, and goes to the whole substance and merits of the case; and that, regard being had to the course pursued by the plaintiffs in creating the ambiguity, the case is not to be held to fall within the ordinary rule, which precludes a defendant from making such an objection at so late a period. I therefore think the rule must be made absolute for setting aside the writ as well as the declaration.

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**MAULE, J.** The statute gives a different mode of proceeding against parties who were members at the time of the contract or of the judgment, from that which it gives against members for the time being. Where a *scire facias* issues against one who is a member for the time being, that is, at the time the writ issues, no leave of the court is necessary: but, in the other cases, leave must first be obtained on motion in open court, and which motion is to be made on notice to the person sought to be charged. Here, it is sought to charge the parties in respect of the liability of the testator and intestate whom they respectively represent. It may be found that the statute gives no remedy in such case: but, at all events, it must be subject to all the conditions that are incident to the liability of the particular class to which they belong, — notice, where notice is necessary, and some attempt to obtain satisfaction against parties primarily liable. No such notice has been given, or attempt made, here. The writ states that *Jane Bowhay* and the two *Jobs* were at the time of



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*the judgment, and still are*, members of the co-partnership: in the latter capacity, they would not be entitled to notice; but, in the former, a previous notice, and leave of the court, would be necessary. To be regular, the writ should enable the party charged to see whether or not it is a writ that requires notice, *viz.* whether it seeks to charge him as a present member of the co-partnership, or as a member at one of the other periods pointed out in the act. This writ, therefore, being equivocal in this respect, is irregular in point of form, and might, I think, have been set aside on that ground. That, however, is an objection which the defendants have passed by. They now object that the substance of the transaction is, that the plaintiffs are seeking to charge them in respect of a liability existing at the time of the judgment, and that therefore notice and leave of the court were necessary. The absence of notice of a proceeding requiring notice, is clearly an objection of substance, and not of mere form. The statute, they say, does not entitle the plaintiffs to have execution against them, until due means have been taken to obtain satisfaction from the parties primarily liable, and due notice given to them. That is an objection which is not apparent on the face of the writ, but appears only when the declaration is delivered. Upon the delivery of the declaration, the defendants obtained orders for time to plead, upon the usual condition on which that indulgence is granted, — that of pleading issuably. According to the ordinary practice, the time for taking advantage of a variance between the writ and the declaration, runs from the time of the filing or delivery of the declaration. The question is, whether a defendant waives that right by obtaining time to plead. On the part of the plaintiffs, it is insisted that, by obtaining time to plead, the defendants have elected to treat the declaration as a thing requiring a plea. I do not, however, consider that they have done so. Suppose this to be a



case of fraud, I think, upon the authority of *Campbell v. Fleming* (a), it was competent to the defendants to elect; for, fraud is no ground for setting aside proceedings, except at the election of the party defrauded. But it is not necessary to take fraud into consideration, as there would be the same right of election upon matter of allegation, as upon the warranty of a horse. I conceive the proper time for the defendants to make their election, in a case like this, was, the time of pleading and not before. The condition imposed upon a defendant by the practice of the court, under such circumstances, is rather a negative than a positive condition; it is that he shall not plead *unissuably*, that he shall not plead a non-issuable plea, or one calculated to entangle the plaintiff in the mazes of special pleading. He does not admit that the declaration is one that must be pleaded to, but that it is one to which he is bound to plead before his time for pleading has expired, or in respect of which he will avail himself of a defence which falls within the condition, that is, that he will set up some substantial answer. He may demur generally; but he may not avail himself of a mere technical defence, by special demurrer. The statute under which this question arises, is one of a very peculiar nature. If the defence here was one that could be pleaded, it would undoubtedly afford a good answer on the merits: but I agree with the court of Exchequer, in *Bradley v. Warburg*, in thinking that it is ground for motion only, and not for a plea. And, being matter of substance, and not of mere form, I think the parties are not too late to avail themselves of the objection.

CRESSWELL, J. I quite agree with the lord chief justice, and my brother *Maule*, that the justice of the case requires that this rule should be made absolute. I have, however, had a difficulty in satisfying my mind that

(a) 1 *Ad. & E.* 40., 3 *N. & M.* 834.

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there was any proper legal ground for coming to that conclusion, by reason of the general rule, that a defendant, by obtaining an order for time to plead, admits that the declaration requires an answer, and, as it seems to me, by *plea* or *general demurrer*. But the ground on which I found my judgment, is, that the plaintiffs here have been guilty of a species of fraud upon the practice of the court, which prevents the application of that general rule. From the form of this writ of *scire facias*, it might be that no leave of the court was necessary for the issuing it. It states that the parties against whom execution is prayed, *viz. Jane Bowhay* and the two *Jobs*, were members of the co-partnership *at the time of the judgment*, and *at the time being*. It might have been sufficient to declare against them as partners at either of those periods. In the one case, notice and leave of the court would be necessary; in the other, not. The declaration, however, when delivered, does not appear to be founded upon that writ: and I cannot imagine the discrepancy between them, to have been accidental. (a) It states that the testator and intestate were respectively members at the time of their deaths, and then proceeds to charge *Jane Bowhay* and the two *Jobs* in their representative characters, not averring them to be members of the co-partnership at all. It may very well be doubted whether the testator and intestate were liable at all, or whether the parties now before the court are liable in respect of assets. Upon the ground, therefore, that the plaintiffs have been guilty of a fraud upon the statute and upon the court, a fraud calculated to betray the defendants

(a) The explanation given by the affidavits in answer to the rule, was, that the plaintiffs had been misled by the returns filed at the stamp-office pursuant to the statute, from which

they were induced at the time of issuing the *scire facias* to believe, that *John-Haye Bowhay* and *Hugh Job* were living, and were still members of the co-partnership.



into a difficulty, I think the case does not fall within the ordinary practice, and that this rule should be made absolute in its terms.

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V. WILLIAMS, J. I also have, with great difficulty, arrived at the conclusion that this rule ought to be made absolute. I think it was properly decided in *Bradley v. Warburg* that an execution issued under a statutory authority of this sort without leave of the court, is not a nullity, but that it is an irregularity only, which is to be taken advantage of by motion, and not by plea. When the declaration in this case was delivered, the parties called upon by the writ had two courses open to them, — either to answer it by plea or by demurrer, or to move to set aside the writ, on the ground that it was on the face of it ambiguous, or on the ground that it had improperly issued without the previous leave of the court. Of the existence of this latter objection, the parties could have had no notice until the plaintiffs had by their declaration expounded the writ. The question is whether, by obtaining time to plead, the defendants in the *scire facias* have precluded themselves from urging the objection. If it be a mere irregularity, I think they have. A defendant who obtains time to plead, undertakes to answer the action by plea or demurrer, and waives his right to offer any mere technical objection. The defendants in this case, therefore, must be taken to have waived their right to object to the *scire facias* on the score of ambiguity. The only doubt arises on the other ground, — that the *scire facias* has issued without leave of the court, in a case in which, as appears from the declaration, the leave of the court was necessary. *Bradley v. Warburg* is an authority to shew that the issuing of a *scire facias* without the leave of the court, is only a ground of notion for irregularity. I feel, therefore, the greatest



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difficulty in coming to any other conclusion than that that objection is waived by obtaining time to plead, because I conceive there are no *degrees* of irregularity. Rules of practice are not to be varied according to the greater or less amount of inconvenience which may arise in their application to the particular case. Either this writ was a nullity, that might have been objected to at *any* stage of the proceedings, or the issuing it was an irregularity, of which the parties were bound to take advantage at the earliest possible moment. The reluctance I feel in concurring with the rest of the court, arises from an apprehension that it will be an undue interference with that general rule. Upon the ground, however, of the fraud on the part of the plaintiffs in varying their ground of complaint in the declaration from that which appeared in the writ, I, with some hesitation, have come to the conclusion that we may regard this, not as a case of irregularity merely, but as one in which the defendants have, under the special circumstances, come to the court within a reasonable time. Upon that ground, therefore, I think this rule may properly be made absolute.

Rule absolute,

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WHITLING v. DES ANGES.

Jan. 20.

A plea in abatement, for the non-joinder of a co-contractor, which prays judgment of the *declaration* only, is informal; it ought to pray judgment of the *writ and declaration*.

**A**SSUMPSIT on a bill of exchange. Plea in abatement, praying judgment of *the declaration*, on the ground the promises therein mentioned were made by the defendant jointly with *A. B.*, who is still living, and resident within the jurisdiction, &c.

only, is informal; it ought to pray judgment of the *writ and declaration*.



Special demurrer, for that the defendant should have prayed judgment of *the writ and declaration*, and not of *the declaration only*. Joinder.

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*Channell*, Serjt., in support of the demurrer. It was for some time doubted whether, since the uniformity-of-process act (*a*), a plea of non-joinder ought to pray judgment of *the writ*; but that doubt is now set at rest by the recent decision in the Exchequer, in *Davies v. Thomson* (*b*), where it was expressly held, that a plea in abatement, for the non-joinder of a co-contractor, which prays judgment of the *declaration*, and that the same may be quashed, is informal; it ought to pray judgment of the *writ and declaration*. (*c*)

*Talfourd*, Serjt., *contra*, admitted that he could not distinguish this case from *Davies v. Thomson*. But he proposed to do what appears, from the report of that case in the Jurist, (*d*) to have been done there at the suggestion of the court, *viz.* that the plaintiff should amend his declaration by inserting therein the name of the co-contractor as a defendant, the now defendant undertaking for his appearance, and to admit, that, if he should himself be proved liable to the plaintiff's demand, the co-contractor was jointly liable with him — without costs on either side.

WILDE, C. J. That is a mere collateral matter which forms no part of the judgment of the court. Upon demurrer it is impossible for us to *impose* terms. The plaintiff must have judgment.

Judgment for the plaintiff.

(*a*) 2 *W. 4. c.* 39.

(*b*) 14 *M. & W.* 161.

(*c*) Adopted in *Stephen on Pleading*, 4th edit. p. 54.

(*d*) Vol. IX. p. 736.



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## MATTHEWS v. LEAPINGWELL.

Jan. 21.

To entitle a landholder to bring an action by way of appeal against a decision of an assistant-tithe-commissioner, under the 6 & 7 W. 4. c. 71., directing tithes to be paid in kind, the yearly value of the payment to be made *by him* thereunder must exceed 20*l*.

And *semble*, that, in estimating such value, he is not entitled to take into the account lands held by him as tenant in common with another who is no party to the appeal.

The landholders of a parish set up, before the

commissioner, a *modus* of 2*d*. per acre: the asserted value of the tithes in kind payable under the award, was 9*d*. per acre: Held by *Coltman, Maule, Cresswell*, and *V. Williams*, JJ. *absenté Wilde*, C. J. that "the payment to be made or withholden according to such decision," was, the *difference* between those two sums.

THE defendant, as vicar of *High Easter*, in the county of *Essex*, claimed to be entitled to certain of the tithes of corn, grain, hay, and wood, arising within the parish (the residue being payable to the dean and chapter of the cathedral church of *St. Paul, London*), and to all other tithes arising within the said parish. The owners of lands in the parish setting up a *modus*, or antient customary payment, of 2*d*. per acre in lieu, and in full satisfaction, of all the tithes in kind, other than the tithes of corn, grain, hay, and wood arising therefrom, the assistant-tithe-commissioner appointed to hear and determine the differences between them, on the 24th of *February*, 1846, by his award, decided that the alleged *modus* of 2*d*. per acre for every acre of the lands within the parish, in lieu of the tithes other than the tithes of corn, grain, hay, and wood, did not exist, and was void and invalid, except as to those portions of the said lands which were known and called by the name of *High Easter Bury Farm*, and *Fox and Crows*, otherwise *Cousin's Farm*; and that the *modus* as to those lands, which belonged to, and were in the occupation of, one *Thomas Saltmarsh*, and were distinguished by well-known metes and bounds, was good and valid.

The plaintiff, the owner and occupier of certain lands in the parish, being dissatisfied with this award, on the 22nd of *May* last, issued a writ of summons for the trial



of a feigned issue pursuant to the 6 & 7 *W. 4. c. 71.*  
s. 46. (a)

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(a) Which enacts "that any person claiming to be interested in any lands, or in the tithes thereof, who shall be dissatisfied with any such decision of the commissioners or assistant-commissioner, may, *if the yearly value of the payment to be made or withholden according to such decision, shall exceed the sum of 20l.*, cause an action to be brought in any of His Majesty's courts of law at *Westminster*, against the person in whose favour such decision shall have been made, within three calendar months next after such decision shall have been notified in writing, in such manner as the commissioners or assistant-commissioner shall direct, to the parties interested therein, or to their known agents; in which action the plaintiff shall deliver a feigned issue, whereby such disputed right may be tried, and shall proceed to a trial at law of such issue at the sittings after the term, or at the assizes then next or next but one after such action shall have been commenced, to be holden for the county within which such lands, or the greater part thereof, are situated; with liberty, nevertheless, for the court in which the same shall have been commenced, or any judge of His Majesty's courts of law at *Westminster*, to extend the time for going to trial therein, or to direct the trial to be in another county, if it shall seem fit to such court or judge so to do: and every defendant in any such action, shall enter

an appearance thereto, and accept such issue; but, in case the parties shall differ as to the form of such issue, or in case the defendant shall fail to enter such appearance or accept such issue, then the same shall be settled under the direction of the court in which the action shall be brought, or by any judge of His Majesty's courts of law at *Westminster*, and the plaintiff may proceed thereon in like manner, as if the defendant had appeared and accepted such issue: and the parties in such action shall produce to each other and their respective attorneys or counsel, at such time and place as any judge may order before trial, and also to the court and jury upon the trial of any such issue, all books, deeds, papers, and writings, terriers, maps, plans, and surveys, relating to the matters in issue, in their respective custody or power; and it shall be lawful for the judge by whom any such action shall be tried, if he shall think fit, to direct the jury to find a verdict subject to the opinion of the court upon a special case; and the verdict which shall be given in any such action, or the judgment of the court upon the case subject to which the same may be given, shall be final and binding upon all parties thereto, unless the court wherein such action shall be brought, shall set aside such verdict, and order a new trial to be had therein, which it shall be lawful for the said court to



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Upon affidavits stating the above facts, and also stating that the yearly value of the payment which would have to be made by the plaintiff to the defendant by virtue of the award did not exceed 20*l.*, and that the tithes of the plaintiff's land covered by the alleged *modus*, and which, according to the award, would thenceforth have to be paid by the plaintiff to the defendant in kind, did not exceed the yearly value of 20*l.*,

*B. Andrews*, in *Michaelmas* term last, obtained a rule calling upon the plaintiff to shew cause why the writ of summons, and all subsequent proceedings, (*a*) should not be set aside.

do, if it shall see fit: Provided also, that, in case any such decision shall involve a question of law only, and the parties in difference shall be agreed upon the facts relating thereto, and whereon such decision shall have been founded, the said commissioners or assistant-commissioner, at the request of the person dissatisfied (such request to be made in writing within three calendar months after such decision, and at least fourteen days' previous notice in writing of such request to be given in like manner to the other parties in difference, or to their known agents), shall direct a case to be stated for the opinion of such one of His Majesty's courts of law at *Westminster* as the commissioners or assistant-commissioner shall think fit; which case shall be settled by them or him, or under their or his direction, in case the parties differ about the same, and may be set down for argument and be brought before the court in

like manner as other cases are brought before the court; and the decision of such court upon every case so brought before it, shall be binding upon all parties concerned therein: Provided always, that, after such verdict given, and not set aside by the court, or after such decision of the court, the said commissioners or assistant-commissioner shall be bound by such verdict or decision; and the costs of every such action, or of stating such case, and obtaining a decision thereon, shall be in the discretion of the court in or by which the same shall be decided; which may order the same to be taxed by the proper officer of the court; and the like execution may be had for the same as if such costs had been recovered upon a judgment of record of the said court."

(*a*) The defendant had, in ignorance of the facts, entered an appearance, but no further step had been taken.



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*E. James* now shewed cause. The affidavit in opposition to the rule stated that the lands in the parish of *High Easter*, mentioned in the affidavit upon which the rule was obtained, contained upwards of 4600 acres; that the lands called *High Easter Bury Farm*, and *Fox and Crows*, otherwise *Cousin's Farm*, also mentioned in the same affidavit, did not together contain more than 300 acres; that the yearly value of the payment which would have to be made to the defendant by virtue of and according to the award and decision mentioned in the said affidavit, in respect of all the lands in the said parish of *High Easter*, except the said lands called *High Easter Bury Farm*, and *Fox and Crows*, otherwise *Cousin's Farm*, greatly exceeded the sum of 20*l.*, and that the tithes other than the tithe of corn, grain, hay, and wood, of all the said lands in the said parish of *High Easter*, except the said lands called *High Easter Bury Farm*, and *Fox and Crows*, otherwise *Cousin's Farm*, which tithes, other than as aforesaid, would, according to the said award and decision, have to be paid to the defendant in kind, greatly exceeded the yearly value of 20*l.*; that the plaintiff, at the time of the making of the said award and decision, and also at the time of the commencement of the suit, was, and still remained, entitled to the entirety of 379 a. 1 r. 4 p. of the said lands in the said parish of *High Easter*, except and other than the said lands called *High Easter Bury Farm*, and *Fox and Crows*, otherwise *Cousin's Farm*, and also to one undivided moiety of and in 591 other acres of the said lands of the said parish of *High Easter*, except and other than the said lands called *High Easter Bury Farm*, and *Fox and Crows*, otherwise *Cousin's Farm*, and that the plaintiff would, by virtue of, and according to, the said award and decision, have to pay to the defendant all the tithes other than the tithe of corn, grain, hay, and wood, of the said lands to the entirety



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whereof the plaintiff was and remained so entitled as aforesaid, and also one moiety of all the tithes other than the tithe of corn, grain, hay, and wood, of the said lands to a moiety whereof the plaintiff was and remained so entitled as aforesaid; that 9*d.* *per acre per annum* was the fair and reasonable value of all the tithes other than the tithes of corn, grain, hay, and wood, of the lands to the entirety whereof the plaintiff was so entitled as aforesaid, and also of the lands to a moiety whereof the plaintiff was so entitled as aforesaid; that the yearly value of the payment which would have to be made by the plaintiff to the defendant, by virtue of and according to the said award and decision, *did* exceed the sum of 20*l.*; that the tithes other than the tithe of corn, grain, hay, and wood, of the lands to the entirety whereof the plaintiff was so entitled as aforesaid, and of the lands to a moiety whereof the plaintiff was so entitled as aforesaid, and which according to the said award and decision would thenceforth have to be paid to the defendant in kind, *did* exceed the yearly value of 20*l.*; and that the tithes other than the tithe of corn, grain, hay, and wood, of the lands to the entirety whereof the plaintiff was so entitled as aforesaid, together with the tithes other than the tithe of corn, grain, hay, and wood, of the lands to a moiety whereof the plaintiff was so entitled as aforesaid, — which tithes, other than as aforesaid, of the said lands to the entirety whereof the plaintiff was entitled as aforesaid, and which moiety of the tithes, other than as aforesaid, of the said lands to a moiety whereof the plaintiff was entitled as aforesaid, had, according to the said award and decision, thenceforth to be paid by the plaintiff to the defendant in kind, — *did* exceed the yearly value of 20*l.*

The affidavit in answer to the rule, — which was made by a valuer of considerable experience, — conclusively shews that the yearly value of the payment to be made



or withholden *by the plaintiff* under the award of the assistant-tithe-commissioner, exceeds 20*l.*

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Assuming, however, that that is not satisfactorily established, still it is submitted that the holders of land are entitled to an appeal under section 46., if the yearly value of the payment to be made or withholden *in respect of the whole parish*, exceeds 20*l.* If this were not so, the provision would be almost entirely nugatory; for, there are few parishes in which the tenures are so large that the payment of any individual landholder, would exceed 20*l. per annum.* The award of the assistant-tithe-commissioner is to be final only in the event of the subject-matter being of a value less than 20*l.* yearly. [*Maule, J.* You must, to entitle you to sustain this appeal, shew that the verdict in *this* action will affect the interests of the plaintiff to an extent exceeding 20*l. per annum.*] There is nothing in the language of the act limiting it to the individual appellant. A verdict upon this issue establishing the *modus* set up, would be conclusive as to the rights of the whole parish. The award is to have no force while the appeal is pending. (*a*) *V. Williams, J.* If your argument be correct, the application to consolidate the several actions, in *Ward v. Pomfret* (*b*) was unnecessary. *Cresswell, J.* Does the proposed issue involve a question of *modus* for the whole parish, or is it confined to the lands occupied by the plaintiff?] The decision one way would vitiate the award as to the entire parish.

*B. Andrews* and *Worlledge*, in support of the rule. *Tomlinson v. Boughey* (*c*) and *Flanders v. Bunbury* (*d*) are distinct authorities to shew that no appeal is given

(*a*) By sect. 50.

(*b*) 1 *M. & G.* 559., 1 *Scott*,  
*J. R.* 403.

(*c*) *Antè*, Vol. I. p. 663.

(*d*) Cited, *antè*, Vol. I.  
p. 678.



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unless the yearly value of the payment to be made or withholden by the individual appellant exceeds 20%. [The court desired the counsel to confine themselves to the question of fact.] To entitle the plaintiff to an issue, he is bound to shew that he is liable under the award to a yearly payment exceeding 20%. ; and, in order to make up that sum, he is not at liberty to take into the account a payment charged on lands in respect of which his interest is that of a joint-tenant or tenant in common. The affidavit ought to shew the precise nature of the interest. In that respect this affidavit is deficient. One tenant in common cannot alone appeal : the whole estate must be represented. [*V. Williams*, J. Suppose the other tenant in common were the clergyman himself?] That might give rise to a difficulty. The co-tenant is now concluded by the award. His moiety, therefore, must remain subject to payment of tithes in kind. Under these circumstances, there cannot be an appeal for the purpose of establishing a *modus* as to the other moiety.

Assuming, however, that, in ascertaining the amount of the sum in dispute under the award, the plaintiff is entitled to take into the account his undivided moiety of the lands held in common, the yearly value will still fall short of 20%. He claims to be entitled to the entirety of 379 acres and a fraction, and to a moiety of 591 acres. Taking the aggregate to be 675 acres, the difference between the *modus* of 2*d.* per acre sought to be set up by the landholders, and the value of the tithes stated in the plaintiff's own affidavit, *viz.* 9*d.* per acre, being 7*d.* per acre, the whole yearly value of the sum in dispute between the plaintiff and defendant in this case would be but 19*l.* 13*s.* 9*d.* The defendant would, therefore, clearly be barred of his appeal, by the construction put upon the act in the two cases cited ; and consequently the plaintiff must be equally barred.



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MAULE, J. (a) The appellant in this case has no right of action, unless he clearly brings himself in point of value within the 46th section of the statute, that is, unless he shews that the yearly value of the payment to be made or withholden, according to the award of the tithe-commissioners or assistant-commissioner, exceeds the sum of 20*l*. It appears that the appellant is interested in certain lands in severalty, and that he is interested jointly with another person, as tenant in common, in certain other lands in the parish. It may well be doubted whether the words "interested in lands" do not mean that the party has some interest in the *whole* of the lands in question. It is difficult to say how one of two joint-tenants or tenants in common, is to bind his co-tenant. It is not, however, the duty of the court to give such a construction to the act as will avoid every difficulty that may be suggested. I do not know how one of two tenants in common is to establish a *modus* without the consent of his co-tenant. That, however, is not so obvious an inconvenience, as necessarily to lead to the conclusion, that it is at variance with the intention of the legislature. I conceive that the true construction of the act does require that the whole lands shall be represented for some interest. That being so, the plaintiff's undivided moiety of the 591 acres must be excluded from the valuation. But, taking the plaintiff's moiety of the 591 acres into the account, the value is still insufficient to entitle the plaintiff to appeal. The assistant-tithe-commissioner by his award finds that the claim of the defendant is not limited to 2*d*. per acre, but that he is entitled to tithes in kind; and the value of the tithes in kind is stated in the plaintiff's affidavit to amount only to 9*d*. per acre. The value of the matter in dispute, therefore, is, the difference between 2*d*. and

(a) The Lord Chief Justice was absent.



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9d. per acre, and that, on calculation, will be found to fall short of 20l. (a) I do not think it can be successfully contended that a judgment in this action would be binding either upon other landowners in the parish, or upon the assistant-tithe-commissioner in respect of other lands. I think the rule should be made absolute.

CRESSWELL, J. I am of the same opinion. I think Mr. *James* has failed to make out that this plaintiff, in respect of his own land, is to be considered as representing the entire parish. As to his own individual interest, — even assuming that he is entitled to add that which he holds as tenant in common, — the yearly payment in dispute does not amount in value to 20l.

V. WILLIAMS, J. I am of the same opinion. *Flanders v. Bunbury*, or rather *New England v. Bunbury* (for, that was the name of the cause,) is in point. As to the facts, the value, according to the plaintiff's own shewing, is 9d. per acre, which is 7d. beyond the *modus* insisted upon before the assistant-tithe-commissioner. Taking it in the most favorable way for the plaintiff (which, however, is not, in my judgment, the correct way), the value still falls short of 20l. *per annum*.

Rule absolute.

(a) The words of the statute are, "the yearly value of the *payment* to be made or withholden according to such decision," not "the value of the *matter in dispute*." Where tithes are paid in kind, "the payment to be made" appears to be equivalent to "the produce to be set out." *Quære*,

therefore, whether, unless the terms used are to be extended by equity, "the yearly value of the payment to be made (or produce to be set out) according to the decision of the assistant-tithe-commissioner," is not to be taken as the *full value* of the tithes in kind?



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## TOWNE v. CAMPBELL.

Jan. 26.

**A**SSUMPSIT for the use and occupation of a dwelling-house, with a count upon an account stated.

Pleas — first, except as to 189*l.*, non assumpsit — secondly, as to 126*l.*, payment before action brought — thirdly, as to 63*l.* a tender. Issue thereon.

The cause came on for trial as an undefended cause, before *Coltman, J.*, at the last sitting at *Westminster*, in the present term. The action was brought to recover a quarter's rent of a furnished house at *Hyde Park Corner*. The defendant had originally hired the house for three unar months. There was no evidence of the terms of the hiring, other than what could be inferred from the following receipt, signed by the plaintiff: —

“*August 10th, 1846. Received of P. L. Campbell, Esq., one hundred and twenty-six pounds, for rent of furnished house from the 8th of May to the 1st of August instant.*”

The defendant continued to occupy until the 21st of *August*, when *Mrs. Campbell* wrote to him, desiring him to send for the key. The plaintiff, however, claimed to be entitled to rent for a second quarter, upon the terms indicated by the above receipt.

The learned judge told the jury that the question for them to consider, was, whether they could infer from the evidence produced before them that the hiring was a quarterly(*a*) or a weekly hiring. If the former, his lord-

ter's notice would have been necessary.

*Quære*, whether in the absence of evidence of a contract or usage requiring notice to quit, a notice is necessary to determine a weekly hiring of furnished apartments.

(*a*) The hiring for three unar months, and the language of the receipt, would seem to point rather to a weekly, or a monthly tenancy, than a quarterly.

The only evidence of the terms on which apartments were hired, consisted of the following receipt — “*Received of P. L. C. one hundred and twenty-six pounds, for rent of furnished house from the 8th of May to the 1st of August instant*” — and a correspondence about the return of the key: — Held, that the jury were warranted in inferring that the hiring was weekly, and not quarterly.

*Semble, per Coltman, J.*, that, if the hiring had been quarterly, a quar-



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ship said, the plaintiff was entitled to a quarter's rent (a); if the latter, he was perhaps entitled to a week's notice to quit, and it would be for them to say whether such notice had been given or not. Mrs. Campbell's letter of the 21st of *August*, he observed, was not a formal notice, but it was an offer to give up the premises, and furnished *some* evidence, under the circumstances, that a notice had been given.

The jury found that the tenancy was weekly, and that there had been due notice to quit. A verdict was accordingly entered for the defendant on the first two issues, and for the plaintiff on the third, with 1s. damages.

*Lush*, for the plaintiff, now moved for a new trial on the ground of misdirection, and also that the verdict was against evidence. There was no evidence to warrant the jury in coming to any other conclusion than that the hiring was quarterly. [*Coltman*, J. There was no evidence to shew what the hiring was: it only appeared that the defendant occupied for a given period, for which he paid 120 guineas, and that he afterwards held over for a few weeks.] There was, at all events, no evidence to shew that the tenancy was weekly. No weekly payments were ever made. Nor was there anything to warrant the inference suggested that a notice to quit had been given. The letter of the 21st of *August* was a mere offer to return the key. [*Cresswell*, J. The case of *Huffell v. Armitstead* (b) seems to be an authority to shew that no notice to quit is necessary at all in the case of a weekly tenancy. *Parke*, B., there says: "Upon the question of the necessity of a notice to quit, the law is clearly settled that a *yearly* tenancy cannot be determined without *half a year's notice*. But that rule

(a) And see *Kemp v. Derrett*, 3 *Campb.* 510.

(b) 7 C. & P. 56.



cannot be applied to a weekly taking; for, the effect of it would be to shew that *a half week's notice* was necessary to put an end to such a tenancy. I am not aware that it has ever been decided, that, in the case of an ordinary monthly or weekly tenancy, a month's or a week's notice to quit must be given. The cases that have been cited (*a*) are not authorities in support of this proposition. A tenant who enters upon a fresh week may be bound to continue until the expiration of that week, or to pay the week's rent; but this is a very different thing from giving a week's notice to quit. The proposition contended for is this, that, if a tenant commences a new week without giving notice, he is to be considered as contracting to hold, not only for that week, but also for the following week. I am of opinion, in the absence of any evidence to prove a usage to that effect (*b*), that, in point of law, a week's notice to quit is not implied as a part of the contract, in the case of an ordinary weekly taking." It was put to the jury there to say whether or not it was part of the contract between the parties that the tenancy should be put an end to without a week's notice. The learned judge in this case, however, did not so put it to the jury.

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MAULE, J. I am of opinion that no rule ought to be granted in this case. It was left to the jury to say whether the tenancy proved was a weekly tenancy, and whether it had been put an end to by a proper notice to quit. They found both these questions in the affirmative. The question now is whether that conclusion was warranted by the evidence. I think it was. The plaintiff gave no evidence to shew a quarterly hiring;

(*a*) *Doe d. Parry v. Hazell*, 1 *Esp. N. P. C.* 94., and *Roe d. Peacock v. Raffan*, 6 *Esp. N. P. C.* 4.      (*b*) See *Wood v. Wood*, 1 *C. & P.* 59.



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and, regard being had to the subject-matter of the contract, I think it was by no means unreasonable to infer that the tenancy was weekly. If so, the plaintiff should have given some evidence to shew that it was part of the contract that a week's notice to quit should be given. This he did not do: and it is not at all an unusual thing to hire furnished apartments by the month or the week without any stipulation for notice. Besides, it may well be doubted whether there was not *some* evidence to shew that a notice to quit had been given.

Upon the whole, I see no ground to object either to the summing up or to the conclusion to which the jury came.

The rest of the court (*a*) concurring,

Rule refused. (*b*)

(*a*) *Coltman, Cresswell, and V. Williams, JJ. ; Wilde, C. J.,* being absent.

(*b*) Supposing a notice to quit to be necessary in a tenancy from three months to three months, without proof of either usage or express stipulation (as to which see what is said by

Lord Mansfield in *Right d. Flower v. Barber*, 1 T. R. 162., and by Lord Ellenborough in *Kemp v. Derrett*, 3 Campb. 511., and *suprà*, 922.), it would appear to be equally necessary for the purpose of determining a monthly or a weekly tenancy.



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## SCOTT and Another v. BERKELEY.

Jan. 27.

**SCIRE FACIAS** *quare executionem non* against the defendant as a member of "*The India-Steam-Ship Company*," upon a judgment obtained against the secretary.

The writ and declaration stated that the plaintiffs recovered against *Henry Manning*, the secretary of a certain company called "*The India-Steam-Ship Company*," constituted by an act of parliament passed in the year 1838, for forming and regulating a company to be called "*The India-Steam-Ship Company*," and who was summoned as the nominal defendant for the said company, the sum of 35,006*l.* 1*s.* 9*d.* for damages for non-performance of a contract made by the company with the plaintiffs and one *Robert Sinclair*, deceased, and that the defendant was a member of the company at the time of the recovering and giving of the judgment.

The defendant pleaded, that, at the time of the recovering and giving of the said judgment, he was not a member of the said company. At the trial before *Tindal*, C. J., at the sittings at *Guildhall* after *Trinity* term, 1845, a verdict was taken for the plaintiffs, sub-

In 1837 several parties associated together to form a joint-stock company, engaged offices, clerks, &c., and circulated prospectuses containing the defendant's name as a director. The defendant attended meetings and received summonses from *October*, 1837, to *March*, 1838, but ceased to attend the one and receive the other after that time, though the

company continued to meet till *March*, 1839. On the 31st *July*, 1838, an act passed forming and regulating the company, in which the defendant and several other parties, and all other persons who should take shares, were united into a company. In a deed prepared from instructions given in *November*, 1837, the defendant's name was set forth as a director, and a seal placed on the deed for his signature; but he never executed the deed.

On the 6th *November*, 1843, judgment in an action commenced on the 15th *April*, 1840, was signed against the secretary of the company, upon which judgment a *scire facias quare executionem non* issued against the defendant:—

Held, on a special case under which the court were at liberty to draw such inferences as a jury ought to have drawn, that the foregoing facts did not sufficiently shew that the defendant was a member of the company at the time when the judgment was obtained.



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In the year 1837, several gentlemen associated themselves for the purpose of forming a company, to be called "*The India-Steam-Ship Company*," for the establishment of a communication by steam vessels between this country and *India*, by way of the *Cape of Good Hope*, and between this country and *Australia*. They engaged apartments at No. 7. *Pall Mall*, upon the outer windows of which the title of the company was announced in large letters ; they furnished there a board-room for the directors ; they engaged clerks, a messenger, porter, and other servants ; appointed a solicitor to the company, auditors, agents, and bankers, and issued and publicly circulated prospectuses. The prospectus commenced as follows : — "*Prospectus of The India-Steam-Ship Company by the Cape of Good Hope. Capital 500,000*l.*, in shares of 50*l.* each. Directors — Capt. Sir J. Ross, C. B., Royal Navy, Chairman, Augustus Manning, Esq., Chalk-Hill House, Kingsbury, Deputy-Chairman, the Honourable Crave, Berkeley, M. P. (the defendant), Spring Gardens. [Then followed the names of other gentlemen whose names were also subsequently inserted with that of the defendant in the company's acts as hereinafter mentioned.] The prospectus went on to give the names of the auditors, engineers, agents, bankers, and solicitors ; and, after pointing out the objects and advantages of the scheme, proceeded as follows : — " The articles and rules may be seen, and information may be had of the secretary, at the Company's Office, 7. *Pall Mall*, to whom applications for shares are to be addressed ; and also to the solicitor, No. 4. *New Bridge Street, Blackfriars.*"*

In the course of the months of *October, November, and December, 1837, and January, February, and March, 1838*, the defendant, from time to time, attended as a



director at the board-room in *Pall Mall*; and summonses to attend the meeting of directors, together with all papers issued by the board, and prospectuses, were delivered, from time to time, in official envelopes by the messenger and porter at the places of abode of the several persons named in the prospectus as directors, including that of the defendant in *Spring Gardens*. The messenger did not leave papers or summonses at the defendant's residence after *March*, 1838, and the defendant did not attend at the board after that time. On the 31st of *May*, 1838, the act passed for forming the said "*India-Steam-Ship Company*" (1 & 2 *Vict. c. xcvi.*). By that act, it was, among other things, enacted, that Sir *John Ross*, the Honourable *Craven Berkeley* (the defendant), *Thynne-Howe Gwynne*, *Thomas-James Barrow*, *Charles-Spencer Bunyan*, *Edward Walpole*, and *William Hopson*, Esquires, and all and every such person or persons, body and bodies politic, corporate or collegiate, who should be, or might from time to time become, a proprietor or proprietors of any share or shares in the undertaking thereby established, and their respective successors, executors, administrators, and assigns, should be, and they were hereby, united into a company by the name of "*The India-Steam-Ship Company*." The defendant was a member of the House of Commons at the time of the passing of this act; but there was no evidence to shew that he was personally aware of the passing of the act, or of its contents. On the 30th of *July*, 1839, *Mr. Manning* the secretary, presented for enrolment in the high court of Chancery, a list purporting to be a memorial of the names and descriptions of the secretary, and of the several persons being members of the said company, in the form for that purpose expressed in the schedule to the said act annexed; and such memorial is enrolled upon the oath of the said *Mr. Manning*

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recovering of the said judgment. If so, execution is to issue against the defendant for a sum to be agreed upon. If not, a verdict is to be entered for the defendant. And it is agreed that the pleadings and the company's act, and a copy of the memorial, and the before-mentioned record, are to form a part of the case; and that the court shall be at liberty, if they shall be so pleased, to draw such inferences as they think that a jury ought to have drawn.

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*Greenwood* (with whom was *Shee*, Serjt.), for the plaintiff. The first (a) section of the act of parliament forming the company, constitutes the defendant an actual member thereof. It is hardly necessary to refer to authorities to shew the power of parliament. Lord Coke says: "The power and jurisdiction of the parliament is

(a) By the 1st section of the act (1 & 2 Vict. c. xcvi.) certain persons including the defendants) and all other persons who should become proprietors of shares, were united into a company, by the name of "*The India-Ship Company*."

By the 6th section, it was enacted, that, from and after the passing of the act, all actions, &c., by and against the said company, should and might be commenced by and against the secretary for the time being, &c.

By the 9th section, — that a memorial of the names and descriptions of the several persons being *members* of the said company (in the form for that purpose expressed in the schedule hereunto annexed,) shall be inrolled, upon oath, in the court of Chancery within twelve calendar months from the passing of the act; and, when any

person or persons shall cease to be a member or members of the said company, a memorial thereof shall, in like manner, be inrolled as aforesaid, &c.

By the 10th section, — that, until such memorial as first hereinbefore mentioned shall have been inrolled, no action shall be brought by the said company under the authority of the said act; and all the members whose names are expressed in any inrolment made in pursuance of the said act, shall be liable to all actions, judgments, &c., &c., until a memorial of their having ceased to be members shall have been inrolled.

By the 11th section, — that execution upon any judgment obtained against the secretary of the said company, may be issued against any members for the time being of the said company, &c.



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so transcendent and absolute, as it cannot be confined, either for causes or persons, within any bounds.” (a) Here, in addition to the positive declaration of an act of parliament, the defendant is stated in the case to have attended meetings of the company for six months, and to have allowed his name to be circulated in prospectuses as a director. It will be argued that the company never had a legal existence, inasmuch as the capital was not subscribed for; and *Dickinson v. Valpy* (b) will be cited. The principle established there is inapplicable to the present case. *Parke, J.*, there says: “But, if a person agree to become a partner at a future time with others, provided other persons agree to do the same, and advance stipulated portions of capital, or provided any other previous conditions are performed, he gives no authority at all to any other individuals until all those conditions are performed.” In this case, however, there is nothing future, so far as regards the directors; for, with respect to them, the company was completely formed. *Nockels v. Crosby* (c), and *Bourne v. Freeth* (d), will also be relied upon, but are likewise distinguishable. Those cases only shew, that, where an attempt to form a company fails by reason of the intended capital’s not being subscribed, the parties subscribing are not liable for the expenses, but only the original projectors. Here, the original projectors of this company are, the defendants, and the other persons named in the act. Moreover, in this case, the existence of the company did not depend on the capital’s being raised; for, the company was constituted by the act. It will be contended that the name of the defendant was inserted in the act

(a) 4 *Inst.* 36. But see  
*Plowd.* 398.; *Bro. Error*, 65.,  
*Parliament*, 16.; *Crompt.*  
*Courts*, 12. a.

(b) 10 *B. & C.* 128., 5 *M.*  
 & *R.* 126.

(c) 3 *B. & C.* 814., 5 *D. &*  
*R.* 751.

(d) 9 *B. & C.* 632., 4 *M.*  
 & *R.* 512.



without his authority. To this assertion two answers may be given :—first, that the *onus* lies on the defendant of proving that the insertion of his name was unauthorised, and that, so far from the case disclosing any evidence in support of that suggestion, the evidence is clearly the other way :—secondly, supposing the insertion to have been without authority, that may be ground for an application to repeal the act, so far as the defendant is concerned, but, until that is done, the act is conclusive. It will next be contended that the true name of the defendant was not inserted in the act : but it does not signify whether he is misnamed or not, so long as his identity is clearly made out. [*Maule, J.* The case affirms that the defendant's name is *Craven Berkeley*. We must take it, as the case stands, that there was a misnomer of him in the act, by the insertion of the name *Fitzhardinge*, of which he does not choose to take advantage. I do not think there is anything in this point.] It will next be argued that the defendant's name was not contained in the memorial which was inrolled. If it had been included, there can be no doubt he would have been liable to all actions that might have been brought against the company ; but it does not follow that he is not liable as an original member, notwithstanding the omission of his name. The memorial was not inrolled for a year with the exception of a day, after the act was obtained. Against whom would actions lie in the interval for the expenses incurred, if not against the original members ? By the sixth section of the act, “ from and after the passing of the act,” actions are to be brought against the secretary of the company. Suppose the action had been brought, soon after the passing of the act, against the secretary, and a *scire facias* sued out against the defendant, could he have said that he was not a member of the company because his name was not inrolled ?

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1847. The court will treat the memorial as wholly inoperative.  
——— [Maule, J. No means are pointed out in the act whereby  
SCOTT persons who have ceased to be members of the com-  
v. pany before the inrolment of the memorial, are to make  
BERKELEY. that fact known, unless it be by such memorial. Is it  
not some evidence that the parties named in it are the  
members of the company, and no other persons?] It is  
obvious that the memorial was not intended to release  
any original member from liability; for, if so, by in-  
rolling it, all the members who were possessed of any  
property might be relieved from the debts of the com-  
pany. [Cresswell, J. Does it appear when this debt  
was incurred?] That is not distinctly shewn, as it is  
laid under a videlicet. [Cresswell, J. I suppose that  
the object of the memorial, is, to enable persons dealing  
with the company to know to whom they give credit.]  
That may be so; but, in the interval, until the me-  
morial is inrolled, to whom are they to look but the  
persons named in the act? It does not follow, however,  
even after the inrolment of a memorial, that parties  
give credit to the persons inrolled as members, and not  
to the original projectors. So far as giving credit is  
concerned, it cannot be said that the memorial is to  
supersede all other evidence, and that the prospectus  
and act are to be entirely left out of consideration. A  
question may arise whether the memorial is of any  
validity, having been inrolled when not one-fifth part of  
the capital was subscribed. The court may say, on the  
authority of the cases already cited, that it would be a  
fraud under such circumstances to make parties liable  
as shareholders, and that the directors could not, by  
omitting their own names, and inrolling a few persons  
as shareholders, escape liability. In *Irwin v. Lord  
Charleville* (a), it was sought to make the defendant  
liable on the ground that his name was contained in

(a) Not reported.



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this very memorial; but Lord *Abinger* held that it would be a fraud to give such an effect to it, seeing that so small a part of the capital was subscribed for. [*Maule, J.* What do you mean by an invalid memorial? One that would not be evidence against the parties inrolled?] Yes. [*V. Williams, J.* The act does not say that all persons shall be liable whose names are inrolled; but all *members*.] It is clear, that, if a party could shew that he was not a member of the company, the memorial would not conclude him. Can the shareholders be said to be members until the capital is subscribed? It is a question whether any persons can be called members of the company unless such capital has been subscribed. [*Maule, J.* Do you say that no memorial could be inrolled, because the whole capital had not been subscribed?] No memorial could be inrolled so as to make those inrolled *alone* liable to be sued. Here, the defendant is liable as an original projector. By the act the company was formed. The contract on which the action was brought was entered into by the company, and the plaintiff has taken proceedings against the secretary as enjoined by the sixth section of the act.

The only question remaining, is, whether the defendant was a member of the company. If so, he did not cease to be a member by his name being omitted out of the memorial. [*Cresswell, J.* You say that the memorial neither put him in nor out of the company.] Suppose the whole capital had been subscribed for within a month after the passing of the act, and the names of the shareholders had been registered in the books, it is clear that they would have been liable on a contract entered into by the company, although no memorial had been inrolled. [*Cresswell, J.* How do you say that the defendant could cease to be a member of the company; or, he could not sell his shares, as none were issued?] He might have great difficulty to get rid of the cha-



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racter. [*Cresswell*, J. Could not the other members agree to release him? *Maule*, J. Parties may agree to cease to be partners.] But not so as to get rid of an antecedent liability. [*Maule*, J. We do not know that this was an antecedent liability. Is not the inrolling of the memorial some evidence that the defendant and the rest of the company had agreed that he should cease to be a member? The affirmative is on you. Can you infer, that, being a member in *March*, 1838, he was a member in *November*, 1843, that is, upwards of five years and four months subsequently to there being any evidence of his being a member. He has not acted as a member since *March*, 1838, and the rest of the company have treated him as *not* being a member. You are suing the defendant under the positive enactments of the act; and the question is, whether the defendant was a member at the time of judgment obtained: whether he was a member at the time of the contract, is a different question.] If the plaintiff shews a time when the defendant was a member, the *onus* is cast on him to prove that he had ceased to be so at the time of the judgment. It is by no means a necessary consequence, that, because the members ceased to meet, the company ceased to exist; or that, because some of the directors ceased to attend, they ceased to be members of the company.

Lastly, it will be contended that the defendant never was a proprietor of shares. There is, however, nothing to limit the liability, under the act, to shareholders. In truth, there never were any shares at all; but, can it be said that there never was any liability? There is a clear distinction to be drawn between original proprietors and persons becoming so by taking shares. It is impossible to shew that the defendant was a member of the company up to the moment when the judgment was signed; but the interval of time is not material; and, when once the defendant is proved to be a member of the company,



he must be presumed to continue a member until he shews the contrary.

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*Channell*, Serjt. (with whom was *Talfourd*, Serjt.), after intimating that he gave up the point as to the misnomer of the defendant in the act, was stopped by the court.

MAULE J. (a) The only question in this case, is, whether the defendant was a member of the company, on the 6th of *November*, 1843, when the judgment was signed. That question is to be made out in the affirmative by the plaintiff; and there are facts on both sides for the court, which is placed in the situation of a jury. It appears, that, in 1837, several parties associated together to form the company; that they engaged offices, and issued prospectuses containing the name of the defendant as one of the directors; and that, between *October*, 1837, and *March*, 1838, he from time to time attended the board-room in that capacity. He conducted himself as a director of the company; and I am of opinion he *was* such director down to *March*, 1838. From that time he no longer treats the company as one of which he is a member; for, he no longer attends the meetings, which is evidence, though not conclusive, that he had ceased to be a director of the company. Down to *March*, he was, through the messenger, treated by the rest of the company as a member; but, although the directors continued to meet until *March*, 1839, the messenger ceased to deliver papers or summonses to him. That fact is evidence that the rest consented that the defendant should no longer be a member of the company. On the 31st of *May*, 1838, the act passed. That act certainly is evidence that the defendant, at the

(a) *Wilde*, C. J., was absent on account of indisposition.



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time of its passing, was a member of the company ; and perhaps it is more than evidence, and *makes* him a member on that day. But it was competent for him and the rest of the directors to agree that he should cease to be a member of the company ; and it did not require an act of parliament or a deed for that purpose ; for, the partnership might be dissolved by parol. Another circumstance showing that the rest of the company no longer considered the defendant a member of the company, is, that a deed of partnership was prepared from instructions given in *November*, 1837 ; and, though his name is put in the deed, he never signs it, nor does it appear that it was ever tendered to him for execution. With respect to the memorial, if it is to be taken as evidence in the case, its effect is, that the secretary, acting, it is to be presumed, under the directions of the company, does not treat him in it as a member ; and there could be no reason for not inrolling his name therein, if he had in reality continued to be a member of the company. Whether the memorial was a valid one or not, it still forms part of the conduct of the rest of the company. If you exclude it, then you have the fact that the defendant is not treated as a member subsequently to *March*, 1838. On the other hand, there is the act of parliament, constituting him a member in *May*, 1839. But, giving whatever force you please to the act, still, in my judgment, it is outweighed by the subsequent conduct of the rest of the company. I cannot, therefore, on the facts before us, satisfactorily arrive at the conclusion that the defendant, on the 6th of *November*, 1843, was a member of the company.

CRESSWELL, J. The question is, whether the court is satisfied, on the facts stated in the special case, that the defendant was a member of the company on the 6th of *November*, 1843. The question is not whether credit



was given to him, or with whom the contract was made; but whether he was at that time a member of the company. If that fact is not established to our satisfaction, sitting here as a jury, we ought to find our verdict for him. There is certainly strong evidence that at one time he was a member of the company; but it cannot be said that the act of parliament constituting him a member, required that he should be released by an instrument of as high a nature, or by deed. The fact of the defendant's attending meetings and receiving summonses up to a certain time, and then ceasing to attend the one and to receive the other, and the fact of his not executing the deed, are strong circumstances to shew that it had been mutually agreed between him and the rest that he should no longer be a member of the company.

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V. WILLIAMS, J. I am of the same opinion. I agree with the rest of the court that the *onus* lay on the plaintiff, to shew that the defendant was a member of the company at the time of judgment obtained. Whether the plaintiff could have recovered against the defendant had he been sued in the ordinary form as a partner, is a question which is not before us, and which we are not called upon to decide.

Postea to the defendant.



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## DAINES v. HEATH.

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By indenture dated the 17th of November, 1845, reciting that A. was indebted to B. in 100*l.*, A. assigned to B. all the goods, fixtures, tools, &c., which then were, or at any time during the continuance of that security should be, in and upon certain premises, to have, receive, and take the said goods, &c., thereby assigned, *as per schedule*, unto B. &c. The deed contained a covenant by A. for payment of the 100*l.* on the 8th of February, 1846, with interest thereon from the 8th of August preceding: —

**C**OVENANT, on a bill of sale, by indenture, made to secure the payment of 100*l.* and interest on a certain day. Breach, non-payment.

Pleas — first, *non est factum* — secondly, that the deed was obtained by fraud and covin.

At the trial before *Coltman, J.*, at the last *Essex* assizes, the plaintiff produced the indenture, which bore date the 17th of November, 1845, and began by reciting that 100*l.* were due from the defendant to the plaintiff for certain fixtures, stock, &c., sold and delivered, and then proceeded to state that the defendant did by those presents bargain, sell, assign, transfer, and set over, unto the plaintiff, &c., all and every the goods, fixtures, tools, utensils, implements, and things which then were, or at any time during the continuance of the security thereby made, should be, in, upon, about, or belonging to the workshops, outhouses, yards, dwelling-houses, and premises, situate, &c., to have, receive, and take the said goods, fixtures, tools, utensils, implements, and things thereby assigned, *as per schedule*, unto the plaintiff, &c. Then followed a covenant for payment of the 100*l.* on the 8th of February, 1846, with interest thereon from the 8th of August preceding. The deed was stamped with a 30*s.* stamp.

For the defendant, it was objected that the deed was insufficiently stamped, and that it could not be read with-

Held, that a mortgage stamp on the deed, applicable to a sum not exceeding 100*l.*, was sufficient.

Held, also, that, in an action of covenant, for non-payment of the money, B. was not bound to produce the schedule.



out the schedule. The learned judge overruled the objections, and the plaintiff had a verdict for 104*l.* 10*s.* 8*d.*, subject to the opinion of the court upon the sufficiency of the stamp, and upon the necessity of giving the schedule in evidence.

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*Badeley*, in *Michaelmas* term last, moved accordingly. The stamp was insufficient to cover the interest accrued prior to the date of the deed, which had then become principal. In *Dickson v. Cass* (a), a bond was given for 2000*l.*, the condition of which, after reciting that *A. B.* had opened an account with *D.*, *E.*, *F.*, and *G.*, as bankers, and that the bankers had agreed to discount bills, and pay in advance, for *A. B.*, any sum not exceeding 1000*l.* in the whole, was, that *A. B.* and *C.* should satisfy and pay the bankers all such sums as they should advance on account of the discounting or paying of any bills, &c., together with such lawful charges and allowances for advancing and paying such bills, as are usually charged by the bankers in such cases, and interest; and it was held, that, this being a bond to secure, not only 1000*l.*, but a further sum for the bankers' charges for commission, &c., the stamp of 5*l.* required by the 55 G. 3. c. 184. sched. part I. tit. "*Bond*," given to secure a sum exceeding 500*l.*, and not exceeding 1000*l.*, was not sufficient. [*Maule*, J. The stamp act imposes the duty only upon the *principal* sum. (b) Here, the claim to the prior interest arises only on the deed. In *Barker v. Smart* (or *Smark*), (c) a bond, dated in *June*, was conditioned for payment of 3000*l.*, with interest at 5 per cent. from *March* preceding; and the court, treating the prior interest as an incident only, held that a 7*l.* stamp

(a) 1 *B. & Ad.* 343.& *Rob.* 130.; *Foreman v.*(b) See *Dixon v. Robinson*,*Jeyes*, 5 *C. & P.* 419.1 *M. & Rob.* 115., 5 *C. & P.*(c) 7 *M. & W.* 590., 9 *Dowl.*96.; *Deardon v. Binns*, 1 *M.**P. C.* 211.



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was sufficient.] That is contrary to the inclination of Lord *Ellenborough's* opinion in *Israel v. Benjamin* (a); and the reasons given for the decision are by no means satisfactory. The circumstance of part of the debt being called interest, will not alter its character.

The plaintiff was clearly bound to produce the schedule. The *habendum*, — the office of which is to “limit the certainty of the estate,” and which “may abridge or alter the generality of the premises” (b), — expressly refers to the schedule, and makes it part of the deed. It is impossible to give any effect to the deed without the production of the schedule. *Weeks v. Maillardet* (c) is precisely in point. There, by articles under seal, the defendant bound himself, under a penalty, to deliver to the plaintiff, by a certain day, “the whole of his mechanical pieces, as per schedule annexed.” In covenant for the breach of the contract in not delivering the pieces, the plaintiff, after setting out the articles executed by the defendant, averred that to the said articles there was *then and there annexed* and subscribed a certain schedule of the said several pieces of mechanism agreed to be delivered, &c.: and it was held, upon *non est factum* pleaded, that it was competent to the defendant to shew, in his defence, that, at the time of the execution of the articles, *the schedule was not annexed*, but that, in fact, it was afterwards subscribed and annexed to the articles by the witness, who was the agent of both parties, immediately after the execution of the articles, and after one of the parties had left the room; though the pieces mentioned in the schedule so annexed were such as had been agreed upon by the parties before the execution of the articles.

(a) 3 *Campb.* 40.

2 *Roll. Abr.* 65. l. 25., 9 *Ca.*

(b) *Com. Dig.* title *Fail.* *Rep.* 47. b. And see *Hob.* 171. (E. 9.); citing *Co. Litt.* 6. a.,

(c) 14 *East*, 568.



WILDE, C. J. Upon the first point, the court is of opinion that there should be no rule. Looking at the words of the stamp act (a) — “Any conveyance of any lands, estate, or property whatsoever, in trust to be sold or otherwise converted into money, which shall be intended only as a security, and shall be redeemable before the sale or other disposal thereof, either by express stipulation or otherwise, except,” &c. — “where the same respectively shall be made as a security for the payment of any definite and certain sum of money advanced or lent at the time, or previously due and owing, or forborne to be paid, being payable” — we think this case does not fall within it. There is nothing on the face of this deed to shew that it was given to secure any thing beyond 100%. It professes to recite what is due, and expressly limits the defendant’s liability to 100% and interest. The covenant for payment is by no means conclusive to shew that any antecedent interest was due. There is nothing incongruous or inconsistent in a party’s covenanting to pay interest calculated from an antecedent period. A statute imposing a tax upon the subject should always receive a strict interpretation, and should not be allowed to operate as a charge, unless the words are plain and unambiguous. But, when we find that a court of co-ordinate jurisdiction has already pronounced a decision upon the subject, we ought not to introduce a doubt by granting a rule.

The other point is one of some difficulty, and therefore as to that the rule may go.

A rule nisi having been granted accordingly,

*Shce*, Serjt., and *Petersdorff*, now shewed cause. The schedule was not annexed to the deed, nor did it appear, by necessary implication, to form any part of it.

(a) 55 G. 3. c. 184. sched. part I. tit. *Mortgage*.

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[*Maule*, J. Would it not be connected with it for the purpose of duty?] No. The act imposes a separate duty upon schedules (a) in the following terms:— “Schedule, inventory, or catalogue of any lands, hereditaments, or heritable subjects, or of any furniture, fixtures, or other goods or effects; or containing the terms and conditions of any proposed sale, lease, or tack, or the conditions and regulations for the cultivation or management of any farm, lands, or other property leased or agreed to be leased; or containing any other matter or matters of contract or stipulation whatsoever, *which shall be referred to* in or by, and be intended to be used or given in evidence as part of, or as material to, any agreement, lease, tack, bond, deed, or other instrument charged with any duty in this schedule, *but which shall be separate and distinct from*, and not indorsed on or annexed to such agreement, lease, tack, bond, deed, or other instrument” — a duty of 1*l.* 5*s.* If the defendant wanted the schedule for any purpose, he might have given a notice to produce, and so made it part of his case. All the plaintiff wanted, was, to prove the covenant for payment of the money. *Weeks v. Maillardet* has nothing to do with this case: there, the schedule was annexed to, and formed part of, the deed declared on. If the argument on the other side were correct, the plaintiff would be bound to produce every deed or document collaterally referred to in the indenture declared on. *Duck v. Braddyll* (b) is an authority, if any were wanting, to shew that that is not necessary.

*Badeley*, in support of the rule. It is not contended, as in *Duck v. Braddyll*, that the deed is vitiated. But

(a) 55 G. 3. c. 184., sched  
part I. tit. *Schedule*.

(b) *M'Clell.* 217., 13 *Price*,  
455.



the objection is, that, inasmuch as the deed refers to, and is wholly unintelligible without, the schedule, in the absence of the latter, the former is not readable. Here, besides the plea of *non est factum*, there is a plea of fraud: now, the whole effect of the deed must be seen before that issue can be disposed of: it is only by reference to the schedule that the deed becomes perfect. [Maule, J. Does a mere reference to another document impose upon a party the necessity of producing that other document, where he is suing upon a covenant for payment of money?] A thing that is quite collateral to the covenant declared on need not be produced. But, here, the only means of ascertaining what is conveyed by the deed, is, by referring to the schedule. [Wilde, C. J. It is perfectly immaterial, for the purposes of this action, what goods were conveyed by the deed.] *Weeks v. Maillardet* is precisely in point. Lord Ellenborough there says: "The question is, whether the objection can be taken on the plea of *non est factum*; and, to determine that, it is necessary to decide whether the schedule is virtually a part of the deed. '*Verba relata hoc maxime operantur per referentiam, ut in eis inesse videntur.*' (a) If it be no part of, but dehors the deed, the objection fails. What, then, was the intention of the parties? It was agreed that the defendant should deliver up to the plaintiff, by a certain day, 'the whole of his mechanical pieces, as per schedule annexed;' all the machineries performing and in good order; and the defendant was also to instruct the plaintiff in the manner of exhibiting and making them perform: and, 'on the day of the defendant's delivering the above pieces, as herein mentioned,' the plaintiff was to pay him a certain sum. Without the schedule, there was no duty to be performed by either party. The schedule alone de-

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(a) *Co. Litt.* 359, a.



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signates the subject-matters to be delivered up by the one party and paid for by the other. The whole deed was inoperative, unless the schedule was co-existing with it, and forming part of the obligation. Taken by itself, the deed is insensible, and has no object to operate upon : therefore it is not the defendant's deed without the schedule, which gives effect and meaning to the whole of the duties to be performed on either side. The articles assume, that, at the time of their execution, the schedule was annexed ; and, if there were then no schedule, there was no deed for any sensible purpose ; for, no duty could be demanded on the one side, or performed on the other, without the schedule." [Wilde, C. J. That would be an authority to the purpose, if this were an action for not delivering up the goods.] The principle contended for is still further exemplified by the case of *Cook v. Remington*. (a) In debt on a bond with a condition to perform covenants in a certain indenture mentioned, the defendant cravedoyer of the indenture ; one of the covenants in which was, that the defendant would safely give up to the plaintiff the goods, *a particular whereof was written on the back of the indenture*. Upon demurrer to a plea of performance generally, it was held " that the indorsement at the time of the ensealing and delivery of the deed, was part of it ; and thereforeoyer of the body of the deed, *withoutoyer of the indorsement*, was not a completeoyer of the deed, the deed relating to the indorsement, and therefore not perfect without it."

WILDE, C. J. This case appears to me to be free from difficulty. The deed declared on contains a distinct covenant for the payment of 100*l.*, with interest, on a given day ; to which full effect may be given with-

(a) 6 *Mod.* 237., 1 *Salk.* 498. And see 1 *Sid.* 50. 97. 425.



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out referring to any thing extrinsic. It may happen that reference is so made in the principal deed to other deeds and documents, as to render it impossible to give effect to such deed without also producing the others. What the plaintiff is bound to produce, must depend upon the particular part of the deed upon which the action is brought. Where he is seeking to enforce performance of a covenant for payment of money, he may very well establish his case without producing a schedule that has relation to a totally distinct and collateral matter. It is always open to a party who seeks to impeach a deed on the ground of fraud, to produce the evidence upon which he relies to establish fraud. In *Weeks v. Maillardet*, the action was brought for non-performance of the covenant to deliver the goods enumerated in the schedule annexed to the deed. Common sense would teach us that the covenant could not be made intelligible without recourse being had to the schedule. The observations of Lord *Ellenborough* must be taken with reference to that state of facts. I think the rule must be discharged.

The rest of the court concurring,

Rule discharged. (a)

(a) See *Ross v. Parker*, 1 B. & C. 358., 2 D. & R. 662. In *Dyer v. Green*, 1 Exch. 71. the plaintiff, upon the trial of an interpleader issue, tendered in evidence a bill of sale and schedule, the former of which assigned to him "all the goods, fixtures, household furniture, plate, &c. &c., in and about a messuage and premises where he now resides, and being No. 2. Park Road, &c., and the chief articles whereof are particularly

enumerated and described in a certain schedule hereunto annexed." The schedule was in no way annexed to the deed, and was inadmissible for want of a stamp.

The court, upon the authority of *Duck v. Braddyll*, held that the bill of sale was admissible in evidence without the schedule.

*Weeks v. Maillardet* was cited at the bar, and was distinguished by the court.



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## BARKER v. STEAD.

One who merely assents to his name being published in a list of a provisional committee of a projected railway company, does not thereby impliedly authorise the secretary, or any one else, to pledge his credit for goods supplied to, or work done for, the company.

To prove that the defendant "*J. S., of B., woolstapler,*" wrote a letter authorising the secretary of a projected railway company to insert his name in the list of committee-men, a witness

was called, who stated that he knew a "*J. S., of B., a woolstapler,*" and that the letter produced, and bearing the *B.* postmark, was his handwriting: the witness further stating that he knew another "*J. S., of B.,*" also a woolstapler—*Sawle*, that this was not evidence to go to the jury to identify *J. S.* the committee-man, with *J. S.* the party sued.

**A**SSUMPSIT, by an advertising agent, for money paid, and for work and labour in procuring advertisements to be inserted in various newspapers, for a projected railway company, to be called *The Northern-and-Eastern-Counties-Junction Railway Company*. The amount claimed by the plaintiff was 910*l.* 9*s.*

The cause was tried before *Coltman, J.*, at the last assizes at *Maidstone*. It appeared that the scheme was projected by one *Morris*, who was provisionally registered, pursuant to the statute 7 & 8 *Vict. c. 110.*, as its promoter; that *Morris* had appointed one *Wright* to be secretary to the company; and that the orders for the advertisements had been given by *Wright*.

On the 6th of *October*, 1845, a prospectus was issued, containing the names of the provisional committee, and amongst them that of "*James Stead, of Bradford.*" The first meeting of the provisional committee took place on the 25th of *October*, before which day all the advertisements had appeared; at this meeting a managing committee was appointed, who seem to have adopted what had been done by *Morris* and the secretary. The defendant was not a member of the managing committee, nor did he ever attend any meeting. Early in *November* it was found that the scheme could not be advantageously prosecuted, and therefore it was abandoned.



In order to prove that the defendant was one of the provisional committee, *Wright*, the secretary, stated, that, towards the end of *September*, he addressed a letter to *James Stead*, a woolstapler, at *Bradford*, asking him if he would allow his name to be put down as one of the provisional committee; that he received in answer a letter, which he produced, bearing the *Bradford* post-mark, purporting to come from *James Stead*, assenting to the proposal.

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In order to prove that this letter was in the handwriting of the defendant, one *Duckett*, a banker at *Bradford*, was called. He stated that he knew a *James Stead*, a woolstapler at *Bradford*, who kept an account at his bank, and was acquainted with his handwriting, which the letter was: he further stated that he was also acquainted with another *James Stead*, who resided at the same place, and carried on the same business. There was no evidence to shew which of these two persons was the party against whom the present action was brought.

On the part of the defendant it was insisted that there was no evidence to go to the jury that he had ever assented to become a member of the provisional committee; and that, assuming that there was, and that the committee-men were liable for orders given by the secretary after the formation of the committee, they were not responsible for orders previously given.

The learned judge told the jury that the defendant, having, — supposing them to be satisfied that the letter of the 2nd of *October* came from him, — assented to act as a member of the provisional committee, must be considered as having authorised the secretary to incur all expenses necessary to the establishment of the company.

The jury having returned a verdict for the plaintiff, damages 500/.,



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*Channell*, Serjt., in *Michaelmas* term last, obtained a rule nisi to enter a nonsuit (pursuant to leave reserved at the trial), if the court should be of opinion that there was no evidence to go to the jury: or for a new trial, on the ground that the verdict was against evidence. As to the identity of the defendant as the writer of the letter, he cited *Sewell v. Evans*. (a)

*Lush* now shewed cause. There was sufficient evidence given to identify *James Stead* as the writer of the letter. [*Wilde*, C. J. Which *James Stead*?] The defendant. In *Simpson v. Dismore* (b), in an action for medicines and attendances by the plaintiff as an apothecary, the plaintiff put in evidence a licence from the Apothecaries' Company to practise as such, granted to a person bearing the same name and surname; and it was held that this was sufficient *prima facie* evidence to shew the identity of the plaintiff with the person named in the licence. So, in *Greenshields v. Crawford* (c), in an action by indorsee against acceptor of a bill of exchange, directed to "*Charles Banner Crawford, East India House*," and accepted "*C. B. Crawford*:" it was proved that this acceptance was the handwriting of a gentleman of the name of *Charles Banner Crawford*, formerly a clerk in the *East India House*, who had left it five years ago; and it was held that this was sufficient evidence of the identity of the defendant with the person whose handwriting was proved. The rule laid down in *Sewell v. Evans*, and *Roden v. Ryde* (a), to prove the execution by the defendant of an instrument on which he is sued, is this — if it be shewn that such instrument is executed by a person bearing the defendant's name, it is not necessary to give evidence strictly identifying

(a) 4 Q. B. 626.

(c) 9 M. & W. 314., 1 Dowl.

(b) 9 M. & W. 47., 1 Dowl. N. S. 439.  
 N. S. 357.



the person whose signature is proved, with the party on whom process has been served, unless facts appear which raise a doubt as to the identity. Lord *Denman*, in the latter case, says: "Where a person, in the course of the ordinary transactions of life, has signed his name to such an instrument as this, I do not think there is an instance in which evidence of identity has been required, except *Jones v. Jones*. (a) There, the name was proved to be very common in the country; and I do not say that evidence of this kind may not be rendered necessary by particular circumstances; as, for instance, length of time since the name was signed. But, in cases where no particular circumstance tends to raise a question as to the party being the same, even identity of name is something from which an inference may be drawn." "The observations of Lord *Abinger*, and *Alderson*, B., in *Greenshields v. Crawford*, apply to this case. The transactions of the world could not go on if such an objection were to prevail. It is unfortunate that the doubt should ever have been raised; and it is best that we should sweep it away as soon as we can." This was a question for the judge, and not for the jury. [*Wilde*, C. J. It was for the judge to say, whether or not the evidence was admissible; for the jury, whether it was sufficient.] Upon the balance of authorities, the identity of name is, *prima facie*, enough. [*Maule*, J. All that the evidence amounts to is this, that the defendant, or the other *James Stead*, wrote the letter. *Wilde*, C. J. referred to *Bulkeley v. Butler* (b), and *Jarmain v. Hooper* (c).]

Assuming the identity of the defendant to have been sufficiently established, the next question is, whether the contract in respect of which this action is brought,

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(a) 9 M. &amp; W. 75.

(c) 6 M. &amp; G. 827., 7 Scott,

(b) 2 B. &amp; C. 434., 3 D. &amp; N. R. 663.

R. 625.



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is one for which the defendant, as a provisional committee-man, is liable to be sued; in other words, whether he permitted himself to be held out as a person who authorised the secretary to make the contract. [*Wilde*, C. J. It appears that the provisional committee met once; and that the only act they did, was, to appoint a committee of management. The orders for the advertisements for which this action is brought had all been given before that time. The learned judge seems to have told the jury that one who authorises the secretary to use his name as a committee-man, gives an implied authority, not to his fellow committee-men, but *to the secretary*, to make contracts so as to bind him. That surely cannot be correct.] The committee adopted all that had been done by the secretary. [*Cresswell*, J. It has been laid down broadly by the court of Exchequer, after full discussion and consideration, in the cases of *Reynell v. Lewis* and *Wyld v. Hopkins* (a), that the mere fact of a person's agreeing to become a member of the provisional committee of an intended railway company, amounts to no more than a promise that he will act with other persons appointed, or to be appointed, for the purpose of carrying the scheme into effect: therefore, in an action against a provisional-committee-man, for goods supplied on the order of the solicitor of the company, it was held that the law would not imply, from the mere fact of his agreeing to be a member of such committee, an authority from him *to every other committee-man* to make contracts by himself or by the solicitor or secretary, or an authority *to the solicitor or secretary* to make them on behalf of the committee.] Lord *Denman*, and some of the other judges of the court of Queen's Bench, have declined to be bound by

(a) 15 *M. & W.* 517. *antè* the defendant was an acting  
 679. And see *Wilson v. Vis-* member of the managing com-  
*count Curzon*, *Ib.* 532., where mittee.



those cases. The point has not yet been discussed in that court *in banco*.

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WILDE, C. J. The court of Exchequer having solemnly decided the point, I think it does not become a court of co-ordinate jurisdiction to entertain a discussion as to the propriety of such decision. That should be left for a court of error. A contrary course would tend to much uncertainty and inconvenience to the public. According to the cases of *Reynell v. Lewis* and *Wyld v. Hopkins*, therefore, from which I, for one, am not disposed to depart, the plaintiff ought to have been nonsuited at the trial.

The rest of the court concurring,

Rule absolute, for a nonsuit.



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## SHAW v. HOLMES.

Jan. 30.

In an action by the secretary against a provisional-committee-man of a projected railway company, for arrears of salary, a judge at chambers ordered that the defendant should be at liberty to inspect, and take copies from, the minute-book of the company containing resolutions of the managing committee, referred to in the plaintiff's particular of demand as the foundation of his claim.

The court refused to rescind the order, the plaintiff not satisfactorily shewing that it was not in his power to comply with it.

THIS was an action brought by the plaintiff to recover from the defendant, one of the committee of management of *The Hull-Birmingham-and-Swansea-Junction-Railway Company*, a balance of 215*l.* 10*s.*, for salary, &c., alleged to be due to him as secretary. The particulars of demand were as follows:—

		£	s	d
" 1846.	May.	To eight months' salary, from 18th Sept. 1845, to 18th May, 1846, at 90 <i>l.</i> per annum, as per resolution of managing committee of the <i>Hull, &amp;c. Railway Company</i> - - - -		
			200	0 0
		" Gratuity, as per ditto - - - -	50	0 0
" August.		To salary from 18th May to 18th August, 1846, 92 days, at 1 <i>l.</i> 1 <i>s.</i> per day, as per resolution of committee -		
			96	12 0
		" To various attendances since 18th August, &c. &c., 18 days, at 1 <i>l.</i> 1 <i>s.</i> -	18	18 0
			<hr/>	
			365	10 0
" Creditor,				
" May 9.		By cash on account - - - -	100	0 0
" August 10.		Do. do. - - - -	50	0 0
			<hr/>	
			215	10 0 "
			<hr/>	

On the 5th instant, *V. Williams, J.*, made the following order, "that the defendant, his attorney or agent, be at liberty to inspect, and take copies from, the minute-book containing the resolution referred to in the particulars of demand, and other books containing any minutes of proceedings or resolutions of the managing committee of *The Hull-Birmingham-and-Swansea-Junction Railway Company*; and that, in the meantime, all further proceedings be stayed."



*Bramwell*, on a former day in this term, obtained a rule nisi to rescind the above order, and also an order giving the defendant six days' further time to plead after inspection. The plaintiff's affidavit, on which the rule was granted, stated, that he was the secretary of the company, and had acted as such from its formation; that he was unable to comply with the order to inspect, in consequence of all the books, vouchers, and documents relating to the company being in the possession and under the control of the solicitor to the company, the same having been placed in his offices, No. 3, *Lothbury*, when the offices of the company were given up, in *October* last past; that the plaintiff had not had the custody or control of any of the books, vouchers, and documents at any time since the order was made; that he ceased to have any such custody or control in the said month of *October* last; that, in the said month of *October* last, the said books and other documents were placed, and had ever since remained, and still were, in the custody, and under the control, of the solicitor, who absolutely refused to produce any of such books and other documents, pursuant to the order, without the authority of the managing committee of the company, unless the defendant would formally admit his liability to the creditors of the company; that it was, in consequence, wholly out of the plaintiff's power to comply with the order, although he was desirous to do so; and that he was not a promoter of the company, nor did he in any way collude with the solicitor to the company.

*Wordsworth* shewed cause. From the affidavits in answer to the rule, it appears, that the solicitor referred to in the plaintiff's affidavit, is registered as the sole promoter of the proposed company, under the statute 7 & 8 *Vict. c. 110.*; that nearly all those who had assented to their names being put down as provisional-

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committee-men, did so upon an indemnity against costs and expenses being given to them by the solicitor and the plaintiff as secretary; and that all the prospectuses of the proposed company filed under the statute, were so filed without the names of any provisional or other committee, and with the names only of the solicitor and secretary. There is, therefore, strong ground for believing that the only persons who *can* exercise any control over the books and documents of the company, are, the solicitor and the plaintiff; and the affidavit of the latter by no means shews, in a manner that the court can consider satisfactory, that he is unable to comply with the order. It has been clearly settled, in a variety of cases, that a defendant is entitled to have inspection of the agreement on which the action is brought, where he has an interest in it, so as to put the plaintiff in the position of one holding it as trustee for him: *Blakey v. Porter* (a); *Ratcliffe v. Bleasby* (b); *Rowe v. Howden* (c); *Rundle v. Beaumont* (d); *Charnock v. Lumley* (e); which latter was an action for money had and received, and yet was held to fall within the spirit of the rule. And in *Steadman v. Arden* (g), in an action by an allottee of railway shares, against a member of the provisional committee, to recover back his deposit, the court of Exchequer ordered that the plaintiff should have an inspection and copy of the subscribers' agreement and parliamentary contract, which both the plaintiff and defendant had signed, and which were in the hands of the solicitors of the company, — the plaintiff's affidavit stating that an inspection of them was necessary to him for the purpose of framing his case, and the defendant not

(a) 1 <i>Taunt.</i> 386.	(d) 4 <i>Bingh.</i> 537., 1 <i>M. &amp;</i>
(b) 3 <i>Bingh.</i> 148., 10 <i>J. B.</i>	<i>P.</i> 396.
<i>Moore</i> , 523.	(e) 5 <i>Scott</i> , 438.
(c) 4 <i>Bingh.</i> 539. n., 1 <i>M.</i>	(g) 15 <i>M. &amp; W.</i> 587.
& <i>P.</i> 334.	



shewing that they were not within his power or control. *Alderson*, B., there says: "All that is material, is, that both parties have an interest in the documents, and that an inspection of them is material to the prosecution of the action." [*Maule*, J. The first part of Mr. Baron *Alderson's* proposition hardly applies to such a case as this. Where there exists one part only of a deed or agreement, it cannot be said to belong to one party more than to the other. But a resolution in a minute-book kept by a joint-stock company, is a thing kept for the company's own private use and information.] The resolution is the agreement, or evidence of the agreement, between the parties.

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*Bramwell*, in support of the rule. The resolution in the minute-book is not an agreement, or even evidence of an agreement, between the parties: it has been held not to need a stamp — *Vaughton v. Brine* (a), *Lucas v. Beach*. (b) The plaintiff, however, is willing to admit that he ought to have complied with the order, if he had the power so to do. He distinctly swears that the books and documents are not in his custody or power, but in the custody of the solicitor, collusion with whom is expressly negatived. [*Cresswell*, J. He does not tell us by whom, or by whose order, or for whose use, the books were deposited with the solicitor.] The solicitor holds them on behalf of the managing committee. And he would probably be guilty of a dereliction of his duty to his employers, if he permitted any person to have access to them without their sanction.

WILDE, C. J. The circumstances of this case are somewhat peculiar. The plaintiff is seeking to enforce

(a) 1 M. & G. 359., 1 Scott,  
N. R. 258.

(b) 1 M. & G. 417., 1 Scott,  
N. R. 351.



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against a member of the provisional committee of a projected railway company, a considerable claim for alleged services in the capacity of secretary to the company. The scheme seems to have been got up by the joint exertions of the plaintiff and the solicitor, by whom many of the committee-men have been indemnified against costs and expenses. The defendant is not indemnified: and there is nothing to shew that he ever in any manner interfered. The plaintiff, as secretary of the company, was the proper person to have, and it appears, had, down to a certain period, the books of the company in his possession. An order having been made upon him to allow the defendant to inspect and take copies of the resolutions in the minute-book of the company, upon which he relies as evidence of the contract with which he seeks to charge the defendant, a rule has been obtained to rescind that order, on the ground that the plaintiff is unable to comply with it. The question is, whether we are satisfied, from the affidavits, that the plaintiff really and truly is, by no fault of his own, disabled from paying obedience to the order. So far from being satisfied of that, it is clear to my mind that he *has* control over these documents, and that he *can* produce them. The plaintiff and the solicitor seem to have taken a more than ordinary interest in the affairs of the company: and, though there is a positive denial of collusion, I cannot believe, that, when the plaintiff deposited the books and documents of the company at the office of the solicitor, he parted with all control over them. It is now suggested that it would be a breach of duty to permit the books to be inspected, without the consent of the managing committee. I think it does not lie in the plaintiff's mouth to say that, when he swears that he is willing to allow the proposed inspection, but that it is physically impossible. Besides, I think it may very well be doubted that there is or ever



was any existing managing committee, that could in reality interfere, to control or prevent the production of the books. And I think the solicitor would hardly venture to interpose any obstacle. At all events, if the plaintiff is unable to produce the books, it is by his own wrongful act, — from the consequences of which we will not relieve him, — that he is prevented from doing so. If any inconvenience arises from the order, it is the plaintiff, and not the defendant, that should bear it.

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MAULE, J. I also think that the plaintiff, who once had the custody of the books in question, has not satisfactorily shewn that they are now beyond his control. If he had been ordered by the managing committee, — supposing such a body to exist, which is extremely problematical, — to deliver up the documents to the solicitor, he would have said so. I have no doubt he can produce them.

The rest of the court concurring,

Rule discharged, with costs.

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WILLIAMS v. CROSLING.

Jan. 30.

**A** FIAT in bankruptcy issued against the defendant on the 17th of *November*, 1846, at which time the sheriff of *Essex* was in possession of the defendant's goods of *B.* under a *fi. fa.* at the suit of *A.* who was resident in *Scotland*, a fiat in bankruptcy issued against *B.*, and his assignees claimed the goods. Upon an application by the sheriff under the interpleader act, a judge at chambers made an order directing an issue in which the assignees were to be plaintiffs, and *A.*, the execution-creditor, defendant, and ordering *that security for costs should not be required*: — The court amended the order, by striking out these latter words, and directed that *A. should give security for costs.*

The sheriff  
being in pos-  
session of the  
goods of *B.*  
under a *fi. fa.*



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goods under a *fi. fa.* at the suit of the plaintiff. On the 3rd of *December*, the sheriff took out a summons, under the interpleader act, calling upon the plaintiff and the official assignee to maintain or relinquish their respective claims to the goods so seized. The summons, —after an adjournment for the purpose of allowing time for the choice of creditors' assignees, — was attended before *Maule, J.*, on the 12th of *December*, when, an issue being proposed, in which the assignees were to be plaintiffs, and the execution-creditor defendant, it was suggested on behalf of the former, that the latter should give security for costs, he being resident in *Scotland*, out of the jurisdiction of the court: but the learned judge made the following order: —

“ I do order, that, upon payment of the sum of 532*l.* 13*s.* 3*d.* into court by the claimants (the assignees) on or before *Wednesday* next, the sheriff do withdraw from the possession of the goods and chattels seized by him under the writ of *fi. fa.* issued herein, and deliver the same to the said claimants: *And I order that security for costs shall not be required:* And I do further order that the parties do proceed to the trial of a feigned issue in the court of Common Pleas, in which the said claimants shall be the plaintiffs, and the said plaintiff in this action, shall be defendant; and that the question to be tried shall be, whether the said goods, at the date of the *fiat* issued against the defendant, were the property of the assignees, as against the execution-creditor: And I further order that such issue shall be prepared and delivered by the plaintiffs therein within ten days from this date, and be returned by the defendant therein within five days, and shall be tried at the sittings in *London*: And I reserve the question of costs, and all further questions, until after the trial of the said issue. Dated,” &c.



*H. Hill*, on a former day, obtained a rule calling upon the execution-creditor to shew cause why the order should not be amended, by striking out so much thereof as directed that security for costs should not be required; and why the plaintiff should not give such security as should be approved of by one of the masters, in case the parties differed, for payment by the plaintiff to the assignees of the defendant, of their costs of the issue. He submitted that the execution-creditor ought not to be placed in a better situation, in this respect, than he would have been in if the sheriff had declined to execute the writ, and an action had been thereupon brought against the sheriff; in which case he clearly would have been compelled to give security.

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*Cowling* now shewed cause. There is no pretence for calling upon the defendant in the issue to give security. The assignees having asked to be made plaintiffs, they must take the disadvantages, as well as the advantages, of that position. In *Benazech v. Bessett (a)*, which is very nearly the converse of this case, it was held that a claimant who is substituted for the defendant under an interpleader rule, is entitled to call upon a foreign plaintiff for security for costs. That case seems to establish, that, if the claimants had been foreigners, the execution-creditor might have called upon them for security. [*Maule, J.* Suppose I had declined to make any order, in that case, either the execution-creditor or the assignees would have had an action against the sheriff, according to the course the sheriff might pursue. Here, the order deprives the assignees of a substantial paymaster which they would have had in the sheriff, if they had been driven to an action against him.]

(a) *Ante*, Vol. II. p. 313., 2 D. & L. 801.



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*H. Hill*, in support of the rule. The plaintiffs in the issue have taken no such step as to preclude their right to make this application. The objection applies only where the party acts voluntarily, and not where, as here, he merely acts in obedience to an order adversely drawn up and served, and which is compulsory on him. The order was dated the 12th of *December*, requiring the assignees to pay into court the value of the goods, and to deliver the issue within ten days; and this rule was obtained on the second day of the term. The assignees have clearly, therefore, been guilty of no laches. *Benazeck v. Bessett* does not apply. That was the case of a mere substitution of one defendant for another. Error will not lie on a feigned issue under the interpleader acts. (a) But there error would have lain; it was a mere substitution of one defendant for another. The cases, therefore, are not identical. The first interpleader act, 1 & 2 *W. 4. c. 58.*, merely gave authority to *the court*, in the case of an application by the sheriff. But the 1 & 2 *Vict. c. 45. s. 2.* enables a judge at chambers to exercise such powers or authorities for the relief and protection of the sheriff or other officer, as might, under the former act, be exercised by the courts; thus incorporating all the previous provisions. The first section of the 1 & 2 *W. 4. c. 58.* empowers the court to make such rules or orders as to costs, and all other matters, as may appear to be just and reasonable. [*Maulc, J.* Is it quite clear that that provision is not confined to the matter which immediately precedes it, viz. where the merits are disposed of by the judge, with the consent of the parties? Under s. 6., power over the costs is given in express terms. I observe that Mr. *Tidd*, in the general form which he gives (b), has

(a) *Snook v. Matlocks*, 5 *Ad. & E.* 239. ; *King v. Simmonds*, 14 *Law J., N. S., Q. B.* 248.

(b) *Tidd's Pr. Forms*, 8th edit. p. 172. § 17.



these words — “ that the plaintiff’s costs in this cause, and the costs of the said plaintiffs, and of the said assignees, of this application, do abide the event of the trial of such issue ; ” but, in the sheriff’s rule (a), this is omitted. It is not necessary, however, to discuss that ; for, this is a sheriff’s rule.] Here, all that the assignees ask, is, that they may not be put in a worse position than they would have been in if the sheriff had sold the goods. The justice of the case manifestly requires that the execution-creditor should be barred, unless he gives security for costs. This rule does not call upon the court to extend the principle that governs cases of this sort, but merely to extend the application of it.

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WILDE, C. J. This question is not altogether free from difficulty : but, looking at all the circumstances, I am inclined to think that we shall do right in making the rule absolute. If there had been no interpleader rule, but the sheriff had withdrawn from possession, leaving the execution-creditor to his ordinary remedy, he could only have brought an action against the sheriff for a false return ; and, in that case, he would have been compelled to give security for costs ; he could in no other way have made his execution available. His situation, therefore, will not be altered by calling upon him to give such security, he being defendant in an issue. If, then, the now defendant is not called upon to do any thing that he might not have been compelled to do if the court had not interfered, do the plaintiffs get any thing which they would not have had if all had remained as it was ? In that case, if *they* had been put to an action against the sheriff, they would have had a defendant resident here, and amenable for costs. They now say to the

(a) *Tidd’s Pr. Forms*, 8th edit. p. 364. § 42.



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execution-creditor — “If you interfere with our remedy against the sheriff, by substituting as a defendant one who is out of the jurisdiction of the court, at least you should give us security for costs.” Seeing, therefore, that we shall neither place the execution-creditor in a worse position, nor the assignees in a better, by ordering the former to give security, and seeing that the statute refers it to the court to make such rules and orders as the justice of the case may seem to require, I think the plaintiffs in the issue should have all such remedies for costs as ordinarily belong to litigants. The situation of the execution-creditor is not in any degree prejudiced by his being made defendant in the issue; for, his execution will not be defeated unless the assignees make out a prior title to the goods. As the execution-creditor is calling on the court to give effect to his execution, justice requires that he should give security for costs. The rule, therefore, ought I think, to be made absolute, in its terms.

MAULE, J. I am of the same opinion. This is an application under the 6th section of the 1 & 2 W. 4. c. 58., which confers upon the court, in the case of the sheriff, larger powers than it possesses in ordinary cases; and probably the reason of this is, that the courts were already in the habit of exercising, in cases in which the sheriff was concerned, an equitable jurisdiction with which the legislature did not mean to interfere. Upon the best consideration I was able to give to the matter when before me at chambers, I thought the right of the assignees to call on the execution-creditor to give security for costs was very doubtful and obscure. One who asserts a right, is bound to convince the court or judge that his claim is well founded. The applicants in this case failed to convince me: and, bearing in mind the maxim of the civilians, “*Semper in obscuris quod mini-*



*mum est sequere,*" I made the order in the terms in which it appears. I now, however, perceive that what I then thought obscure is perfectly clear. I think justice requires that the execution-creditor should be compelled to give security for costs; and I think it will operate no hardship on him so to do; whereas, a contrary course would be manifestly unjust towards the assignees. I see no reason for altering the position of the parties. The assignees are properly made plaintiffs; for, if they fail to prove their case, the execution-creditor will, of course, sustain his execution.

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The rest of the court concurring,

Rule absolute.

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FLETCHER v. TANNER.

Feb. 1.

ON the 11th of *November*, 1846, the defendant was served with a writ of summons at the suit of the plaintiff, indorsed — for debt, 6*l.* 5*s.*, costs 1*l.* 15*s.* On the 4th of *December*, a declaration was delivered, with par-  
On the 11th of *November*, the defendant was served with a writ of summons, indorsed — for 6*l.* 5*s.* debt, costs 1*l.* 15*s.* On the 4th of *December*, the plaintiff delivered a declaration, and on the 14th full particulars of demand. On the 19th, the defendant took out a summons to stay proceedings on payment of 18*s.* without costs, swearing that no more was due, and that he was liable to be summoned to a court of requests; but, the plaintiff claiming more, no order was made. On the 24th, the defendant pleaded, except as to 18*s.*, *nunquam indebitatus* and payment, and, as to 18*s.*, payment into court. On the 9th of *January*, the plaintiff took the money out of court, and entered a *nolle prosequi* as to the rest. On the 20th of *January*, the plaintiff caused his costs to be taxed by the master : —

Held, that the plaintiff was entitled to no costs; and that the defendant was entitled to his costs incurred subsequently to the 19th of *December*.

And held, that the defendant was not too late in applying to the court on the 21st of *January*, to set aside the master's allocatur.



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particulars of demand to the amount of 6*l.* 5*s.* 6*d.* On the 19th, the defendant took out a summons calling upon the plaintiff to shew cause why, on payment of 18*s.*, without costs, the proceedings should not be stayed. The plaintiff claiming more, no order was made; and, on the 24th, the defendant pleaded, except as to 18*s.*, *nunquam indebitatus* and payment, and, as to 18*s.*, payment into court. On the 9th of *January*, 1847, the plaintiff took the money out of court in satisfaction, entered a *nolle prosequi* as to the rest of the record, and gave notice of taxation. On the 11th, the defendant took out a summons calling on the plaintiff to shew cause why he should not be deprived of his costs, and why he should not pay to the defendant, or his attorney, the costs incurred by the defendant, subsequent to the 19th of *December*, the amount taken out of court in satisfaction being less than 40*s.*; and why the proceedings should not in the meantime be stayed. This summons was attended on the 14th, before *Coltman*, J., who declined to entertain the application, it having already been before another judge, and disposed of; but he made an order staying the proceedings for four days, to enable the defendant to apply to the court. On the 19th of *January*, an appointment to tax was given by the plaintiff for the following day, when the costs were taxed, and an allocatur given for the amount. Upon an affidavit of these facts, and stating that 18*s.* was all that was due to the plaintiff, and that the defendant resided within the city of *London*, and was liable to be summoned for the debt there,

*Ball*, on the 21st of *January*, obtained a rule calling upon the plaintiff to shew cause why the allocatur and all subsequent proceedings should not be set aside, and why the master should not be at liberty to review his taxation, and disallow to the plaintiff his costs of the



action, and why the plaintiff should not pay to the defendant his costs of the action incurred subsequently to the 19th of *December* last, together with the costs of the application. He referred to *Thompson v. Gill.* (a)

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*Petersdorff* shewed caused. To entitle a defendant to this kind of relief, he should come promptly. Here, several steps have been taken, and the plaintiff has been put to much needless expense. Besides, under the rule of *Trinity*, 1 *Vict.* (which is in substitution of the 19th rule of *Hilary*, 4 *W.* 4.), the plaintiff is clearly entitled to have his costs taxed on the plea. That rule provides that “the plaintiff, after delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action, in respect of which it has been paid in; and he shall be at liberty in that case to tax his costs of suit, and, in case of non-payment thereof within forty-eight hours, to sign judgment for his costs so taxed,” &c.

*Ball*, in support of his rule. It is laid down in *Archbold's Practice*, (b) and the authorities referred to bear out the statement, that “It is beneath the dignity of the superior courts at *Westminster* to take cognisance of pleas under 40s.; and, in trespass for goods, it is expressly prohibited by 6 *Ed.* 1. c. 8. Therefore, if it appear, either upon the face of the declaration, or by the plaintiff's acknowledgment, or even from the defendant's affidavit, if not denied by the plaintiff, that the sum for which the action is brought is really less than 40s., the court or a judge will stay the proceedings, unless it appear that the debt is not recoverable in any

(a) 6 *Dowl. P. C.* 155.(b) 7th edit., by *Chitty*,  
p. 994.



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county-court, court of requests, or other inferior court. The plaintiff cannot evade this by suing for a larger colourable cause of action." [*V. Williams, J.* Is there any case where the court has interfered in this way after the cause is ended?] In *Cornforth v. Lowcock*, (a) the application was before, in *Sandell v. Bennett* (b) after, verdict. The defendant could not come until after the taxation.

WILDE, C. J. I think the rule must be made absolute. It is quite clear that the action was brought for a sum originally not exceeding 18s. When called on by summons, the plaintiff should have taken the sum tendered. Although it is distinctly sworn by the defendant that 18s. was all that was due, the plaintiff makes no answer.

The rest of the court concurring,

Rule absolute.

(a) 1 *Mann. & R.* 321.

(b) 3 *Dowl. P. C.* 294.



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## Ex parte GILMORE.

Feb. 1.

*J. BROWN* moved that the concurrence of the husband of Mrs. *Sarah Elizabeth Gilmore*, in a conveyance of property to which she was entitled under the will of her father, might be dispensed with, under the 3 & 4 *W. 4. c. 74. s. 91.*, upon her affidavit, that she was married to him in *July, 1843*; that, in *January, 1844*, he left her, to join the government steamer *Hecate*, in which he had entered; that the last she had heard of him was by a letter dated the 20th of *January, 1845*, in which he informed her that he was then on board Her Majesty's ship *Racehorse*, then at *New Zealand*; and that she verily believed that it was his intention never to return to her, but to remain abroad for the purpose of evading the liability of supporting her and her child.

*WILDE, C. J.* I see no ground for the interference of the court in this case. The husband appears to be only temporarily absent, in pursuit of his ordinary calling. It cannot be said that he is, within the meaning of the act, "living apart from his wife."

*MAULE, J.* If this motion were successful, we should be inundated with applications from parties whose husbands were travelling abroad for business, or in pursuit of scientific speculations of such a nature as to make the period of their return doubtful.

The rest of the court concurring,

Rule refused.

The court refused, in 1847, to dispense with the concurrence of a husband, under the 3 & 4 *W. 4. c. 74. s. 91.*, upon an affidavit merely stating that he entered a government steamer in *January, 1844*, and that the last the wife had heard of him, was, that, in *January, 1845*, he was on board another government steamer at *New Zealand*; and that she believed it was his intention never to return.



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## WOOD v. HARDING.

The court cannot take notice of a consent on a summons, unless followed in due time by an order drawn up and served.

A defendant is not bound to return an irregular notice of trial, though made aware, by a notice to produce, that the plaintiff is proceeding thereon.

**T**HE defendant, having on the 7th of *November* obtained *and served* an order for a week's time to plead, "pleading issuably, rejoining gratis, and taking short notice of trial, if necessary, *for the second sitting in Michaelmas term*," on the 16th pleaded non assumpsit. On the 20th, the plaintiffs added the similiter, and delivered the issue, with notice of trial for the sitting *after term*, — the 27th. The cause was tried on the 11th of *December*, as an undefended cause, when a verdict was found for the plaintiff, damages 19*l*.

*Dowdeswell*, on a former day, obtained a rule nisi to set aside the trial and subsequent proceedings, on the ground that the notice of trial was void, the defendant residing more than forty miles from *London*, and therefore being entitled to fourteen days' notice, — the undertaking to accept short notice of trial, if necessary, applying only to the sitting in term. (a)

*Talfourd*, Serjt., shewed cause, upon affidavits stating that the consent indorsed on the summons for time to plead was general, "Take a week — usual terms;" and, in a qualified manner, denying that any order had been served; and also stating that the defendant had received the issue and notice of trial without objection, and retained the same, and had also been served with a notice to produce three days before the day of trial. He submitted, that, if the defendant did not intend to

(a) See *Abbott v. Abbott*, 7 160., *Blaaw v. Chaters*, 6 Taunt. 452., 1 *J. B. Moore*, Taunt. 458., 2 *Marsh*. 151.



treat the notice of trial as a valid notice, he should at once have returned it, especially as he knew, from the notice to produce, that the plaintiff was incurring the expense of proceeding; and that the consent indorsed on the summons did not warrant the order. [*Maule, J.* The court cannot take notice of a consent on a summons, unless followed in due time by an order drawn up and served.]

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*Channell, Serjt., and Willes, contra.* It was so expressly decided in *Joddrell v. ———*. (a) A defendant is not bound to return an irregular notice; and his retaining it is no waiver of the irregularity: *Fell v. Tyne*; (b) *Ranger v. Bligh*. (c)

WILDE, C. J. It is important that the court should act upon one uniform rule in matters of this sort. One cannot but regret, that, after having received the accommodation he asked, the defendant did not, on discovering the irregularity, return the notice of trial; especially when he found, from the notice to produce, that the plaintiff was proceeding to trial upon it. He certainly, however, was not *bound* to return it: and, the plaintiff having gone on to try the cause upon an irregular notice, the rule must be made absolute.

MAULE, J. It is much to be regretted that the defendant's attorney did not intimate to his opponent that his notice of trial was irregular. Still, I think he is entitled to have his rule made absolute.

The rest of the court concurring,

Rule absolute, with costs. (d)

(a) 4 *Taunt.* 253.

(b) 5 *Dowl. P. C.* 246.

(c) *Ib.* 235.

(d) See *Yonge v. Fisher*, 4 *M. & G.* 814., 5 *Scott, N. R.* 893.



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The Wardens and Commonalty of the Mistery  
of FISHMONGERS of the City of LONDON v.  
ROBERTSON and Others.

Feb. 1.

Judgment  
can only be  
entered up  
*nunc pro*  
*tunc*, where  
the delay has  
arisen from  
the act of the  
court.

A. obtained  
judgment  
against B., C.,  
and D., upon  
demurrer to  
certain pleas  
severally  
pleaded by  
them. Upon  
the trial of  
the issues of  
fact, at the  
sittings after  
*Michaelmas*  
term, 1845, a  
verdict was  
found for B.  
and C. upon  
the pleas of

**A**SSUMPSIT upon articles of agreement (not under seal) entered into by the clerk of *The Fishmongers' Company*, on their behalf, with the defendants.

The defendants severed in pleading; two of them, viz. *Robertson* and *Staines*, pleading, amongst other pleas, non assumpsit. At the trial before *Tindal*, C. J., at the sittings in *London* after *Michaelmas* term, 1845 (a), a verdict was taken for the defendants upon non assumpsit, and the jury were discharged as to the other issues of fact; and a bill of exceptions was tendered to the ruling of his lordship, that the contract upon which the action was founded had not been properly proved, by the production of the attesting witnesses to the defendants' signatures, or accounting for their absence. Delay and difficulty arising in settling the bill of exceptions, the defendant *Robertson*, on the 3rd of *March*, 1846, sued out a writ of error upon the judgment for the plaintiffs upon demurrer to certain pleas pleaded by him, as well as by *Staines* (b), and, on the 25th, took non assumpsit by them respectively pleaded, subject to a bill of exceptions; and the jury were discharged as to the other issues. The bill of exceptions was not settled and sealed until the 27th of *May*, 1846, and consequently the *postea* remained in the hands of the associate until shortly after that time. Negotiations were pending between B. and A. as to the form in which the judgment should be entered for himself (B.) and C., until the 22nd of *August*, and, before the form was finally settled between B. and C., B. died: —

The court refused, at the instance of the executors of B., to allow judgment to be entered up for him *nunc pro tunc*.

(a) There had been a former trial; *vide antè*, Vol. I. p. 60.

(b) See 5 M. & G. 131., 6 Scott, N. R. 56.



out a summons calling upon the plaintiffs to carry in the roll. A summons was also about the same time taken out by the plaintiffs, to set aside the writ of error, for irregularity. (a) These summonses came on to be heard on the 6th of *April*, when the judge declined to make any order upon either of them, but directed that the plaintiffs should proceed with their bill of exceptions. The draft bill of exceptions was thereupon delivered to the defendants, and ultimately settled by the then lord chief justice on the 23rd of *May*, and returned to the plaintiffs' attorneys on the 25th, and sealed on the 27th. On the 3rd of *June*, the draft *postea* was obtained by the attorneys for *Robertson*, and returned on the 5th, settled by counsel, making the judgment applicable to *Robertson* and *Staines* only, instead of to all the defendants, as prepared by the associate. A discussion then took place between the respective attorneys for *Robertson* and *Staines* as to the form in which the judgment for them should be entered — whether it should be a joint judgment for the two, or a separate judgment for each of them; and ultimately it was agreed that the judgment should be joint, and a draft settled by counsel was delivered to the plaintiffs' attorneys in the beginning of *July*. On the 22nd of *August*, this draft was returned to *Robertson's* attorneys, altered to a separate judgment, and was immediately sent by them to *Staines's* attorneys, who retained it until the 29th of *October*, on which day *Robertson's* attorneys received notice that *Robertson* had died on the 27th.

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*Murphy*, Serjt. on the 25th of *January*, on behalf of the representatives of *Robertson*, obtained a rule calling upon the plaintiffs to shew cause why he should not be at liberty to sign and enter up judgment *nunc pro tunc*.

(a) *Vide Tolson v. Kaye*, 6 M. & G. 536., 7 Scott, N. R. 222.



entered. Where a case stands over for argument from term to term, on account of the multiplicity of business in the court, or for judgment, from the intricacy of the question, the party ought not to be prejudiced by that delay, but should be allowed to enter up his judgment retrospectively, to meet the justice of the case. No such facts, however, exist in this particular instance; and the delay is imputable alone to the laches of the party interested in the judgment: the rule, therefore, which regulates the former cases, does not apply to this; and, as it is within the operation of the statute, I am of opinion, on the authority of *Copley v. Day* (a), that the rule should be discharged." The same principle was acted upon in *Vaughan v. Wilson*. *Pim v. Reid* (b) shews that the defendants might have signed judgment here, notwithstanding the bill of exceptions. [*Wilde, C. J.* The postea being retained by the associate until the bill of exceptions is sealed, it may be that it is not competent to the plaintiffs to charge the defendants with a delay which they themselves have occasioned.] At all events, that would only excuse the delay down to the 3rd of *June*, when the postea actually came to the defendants' hands. Besides, there is no case in which judgment has been allowed to be entered *nunc pro tunc* after the death of one of *several* defendants.

*Murphy, Serjt.*, and *G. L. Broxne*, in support of the rule. It may be assumed that the signing of judgment was delayed by the bill of exceptions until the 3rd of *June*. [*Wilde, C. J.* Do you find any case in which the court has granted this indulgence, where the delay has been the act of the parties?] Unless there is some imperative and inflexible rule to prevent it, this is clearly a case for the interference of the court. The object of

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(a) 4 Taunt. 702.

(b) 6 Scott, N. R. 1011.



court : and I am not aware of any instance in the books where that rule has been departed from. It may be that the court would grant relief in this way in a case of misconduct or breach of faith : but the present case does not stand upon any such ground. We ought to be satisfied that the parties have done all they could to enter their judgment in due time. There certainly is no rule of court upon the subject ; but I believe the practice is, for the associate to retain the postea where a bill of exceptions is tendered, until it has been settled and sealed by the judge. The postea, then, being in the hands of the officer of the court, and there being a judgment for the plaintiffs on which the defendants were desirous of bringing a writ of error, a summons was taken out calling on the plaintiffs to shew cause why they should not carry in the roll. That application was not successful. The first step to be taken by the defendants before they could be entitled to call on the plaintiffs to carry in the record, was, to enter the judgment in their favour. To do this, the course is, to take the postea to the masters' office, where an entry is made in a book called the judgment book, and an endorsement on the postea marking the day on which the judgment is so signed : and the court acts upon that entry. The judgment dates from that day. (a) Up to the present time, however, the defendants have not signed judgment. On the 3rd of *June*, the attorneys for *Robertson* obtained the postea. It was then in their power to do that which the court is now asked to do. Why did they not then sign judgment on the postea ? All that is suggested, is, that a difficulty was felt as to the form of the judgment,— whether it should be a joint or a several judgment for *Robertson* and *Staines*. The draft judgment it seems was returned to the defendant *Robertson* on the 22nd of *August* ; but, down to the 27th

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(a) See *Fisher v. Dudding*, 3 M. & G. 238., 3 Scott, N. R. 516.



then instant, assign unto the said *H. E. Blake*, her executors, administrators, and assigns, or to such persons as she should appoint, all that messuage, tenement, or public-house, called *The Lamb and Flag*, situate in *Clerkenwell Green*, in the parish of *St. John, Clerkenwell*, in the county of *Middlesex*, with the yard, outbuildings, and appurtenances thereunto belonging, for the residue of a term of years for which the said *E. T. Phinn* then held the same under a lease thereof granted, of which term forty years were then unexpired, subject to the yearly rent of 85*l.*, and to the covenants in such lease contained (the same, nevertheless, being only the usual and ordinary covenants contained in the leases of public-houses), and free from all incumbrances: and the said *E. T. Phinn* agreed to deliver to the said *H. E. Blake* the possession of the said messuage or tenement and premises, on or before the 22nd of *October*, clear of all rent, taxes," &c., &c.: and, for the consideration aforesaid, "the said *H. E. Blake* agreed to accept such assignment, and to pay to the said *E. T. Phinn* the sum of 1000*l.*, being the residue of the purchase-money agreed to be given by her for the said messuage or public-house," &c., on the execution of the said assignment, &c. — "Provided always, nevertheless, that the said *E. T. Phinn* shall not be obliged or compelled to produce, prove, or shew the lessor's title to the said premises, or any part thereof, or his right to it, or to produce or prove any deeds or documents of title, or copies or extracts from any deeds or documents, anterior to the said lease, notwithstanding any recital or mention in the said lease, of such deeds or documents."

The declaration, after setting out the agreement, and alleging payment of the deposit, proceeded to aver, that, in consideration of the premises, and that the plaintiff then promised the defendant to observe and perform the agreement in all things on her, the plain-

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tiff's, part to be observed and performed, the defendant promised that he the defendant would observe and perform the said agreement in all things on his, the defendant's, part to be observed and performed, and that he, the defendant, if requested by the plaintiff so to do, would, in due and convenient time to enable the agreement so made between the defendant and the plaintiff as aforesaid to be performed and completed on or before the 22nd of *October*, 1846, deduce and make, or cause to be deduced and made, to the plaintiff, a good and sufficient title to the said messuage or tenement and premises in the agreement mentioned, and thereby agreed to be assigned, enabling the defendant to assign the said messuage or tenement and premises to the plaintiff free from all incumbrances, pursuant to the said agreement, so far as such title could be deduced and made without it's being necessary for the defendant to produce, prove, or shew the lessor's title to the said premises, or any part thereof, or his right to it, or to produce or prove any deeds or documents of title, or copies or extracts from any deeds or documents, anterior to the lease in the said agreement mentioned; that the plaintiff was always, from the time of making the agreement until and upon the said 22nd of *October*, 1846, and from thence until the commencement of the suit, ready and willing to accept from the defendant and all other necessary parties, an assignment of the said messuage or tenement and premises, free from all incumbrances, pursuant to the said agreement, and to pay to the defendant, pursuant to the said agreement, the said sum of 1000*l.* in the agreement mentioned, &c., and to perform and fulfil in all other respects the said agreement on the part of her the plaintiff, — of all which the defendant afterwards, to wit, on &c., had notice; that, although the plaintiff had always, from the time of making the agreement, in all things on her the plain-



tiff's part to be observed and performed, observed and performed the said agreement, and although the said 22nd of *October*, 1846, had elapsed long before the commencement of the suit; yet the defendant had disregarded his said promise, in this, that he the defendant did not nor would, in due and convenient time to enable the said agreement so made between the defendant and the plaintiff as aforesaid to be performed and completed on or before the said 22nd of *October*, 1846, or at any other time either before or since, deduce or make, or cause to be deduced or made, to the plaintiff a good and sufficient title to the messuage or tenement and premises in the said agreement mentioned, and thereby agreed to be assigned, enabling the defendant to assign the same to the plaintiff free from all incumbrances, pursuant to the said agreement, so far as such title could be deduced and made without it's being necessary for the defendant to produce, prove, or shew the lessor's title to the said premises, or any part thereof, or his right to it, or to produce or prove any deeds or documents of title, or copies or extracts from any deeds or documents, anterior to the lease in the said agreement mentioned, although he the defendant was, after the making of the said agreement, and before the commencement of the suit, and in due, reasonable, and convenient time to enable the defendant so to do, and to enable the agreement to be performed and completed on or before the said 22nd of *October*, 1846, to wit, on &c., requested by the plaintiff so to do; but, on the contrary thereof, he the defendant had hitherto neglected and refused so to do: that, by reason of the said premises, the plaintiff had not only lost and been deprived of all the benefit and advantage which would have accrued to her the plaintiff from the completion of the said agreement by the defendant, but had also incurred and been put to great costs, charges, and expenses, amounting, to wit,

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was not such a defect of title as to justify a purchaser in declining to complete; and that it was not competent to the plaintiff to prove the contents of the leases, without calling the subscribing witnesses in the usual way.

The learned judge overruled the objections, and directed a verdict for the plaintiff for the amount of the deposit, and 4*l.* 19*s.* 2*d.*, the expense incurred by the plaintiff in the investigation of the title; leave being reserved to the defendant to move to enter a nonsuit, if the court should be of opinion that either objection was well founded.

*C. Jones*, Serjt., on a former day in this term, moved accordingly. He submitted, that, whatever might be the rule in equity, the evidence disclosed a perfectly good title at law; and that the contents of the deeds were not properly proved by the mere statement of the clerk of the plaintiff's solicitor, refreshing his memory by extracts made by him from the deeds when produced to him for inspection by the brewers in whose hands they were deposited, and from the memorial of the underlease inrolled at the register office for *Middlesex*.

*Cur. adv. vult.*

MAULE, J. We think that the objection to the title was a valid one, and consequently that the plaintiff was entitled to recover back the deposit and the expenses she had been put to in investigating the title.

With respect to the other objection, that the contents of the deeds were not well proved, we think there is no foundation for it.

Rule refused. (*a*)

(*a*) "Where the estate agreed to be leased was comprised with others in an original lease, under which the lessor had a right to re-enter for breach of covenants, so that the under-lessee might be evicted without any breach on his part, it was held, by Sir *John Leach*, V. C., that he was not bound to accept the title with an indemnity. He observed, that, where a

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party comes for a specific performance, he desires the court to give the party the specific subject. Now, here, he could not secure the possession of the subject upon the terms agreed upon. But he offers an indemnity. *The lessor might be evicted*, and therefore it was compensation, and not indemnity, that was offered. I will

give you the subject of the contract, not with a sure title, but with a compensation in case of eviction. It was not a case for an indemnity, and the court could not compel a performance with a compensation." *Sugden's Vendors and Purchasers*, 10th edit. p. 163.; citing *Fildes v. Hooker*, 3 Madd. 193.

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CLARK v. SMITH.

Feb. 1.

Upon an application, at chambers, under the 5 & 6 Vict. c. 122. s. 42., to discharge a bankrupt who has obtained his certificate, from execution for a demand provable under the *fiat* it is competent to the judge to receive affidavits to shew that the certificate is void, by reason of gaming, under s. 38.

In such a case, the court has no original jurisdiction.

THE defendant commenced trading as a printer and newspaper proprietor, on the 1st of *January*, 1843. Judgment was obtained against him in this action on the 15th of *February*, 1845. On the 8th of *June*, 1846, a *fiat* issued against him, under which he was duly declared a bankrupt, and obtained a certificate of conformity in *August* following.

On the 8th of *October*, a summons was taken out, calling upon the plaintiff to shew cause why the defendant should not be discharged out of the custody of the keeper of the Queen's Prison, — he having been taken under a *ca. sa.* at the suit of one *Wearing* on the 22nd of *August*, 1845, and subsequently detained at the suit of the present plaintiff, — as to this action, on the ground that he had obtained his certificate of conformity under the *fiat* issued against him, and that the debt in this action was provable under such *fiat*. This summons was heard on the 12th before *Erle*, J., and dismissed, on the ground that it was proved, to the satisfaction of the learned judge, that the defendant had sustained losses by gaming, so as to avoid his certificate, under the 5 & 6 Vict. c. 122. s. 38.



On the 16th of *October*, a second summons was taken out, to shew cause as before, “or why a writ of *audita querela* should not issue, or why the defendant should not be discharged out of the said custody, on giving bail, to be approved of by the master, to abide the event of any issue which might be directed, to invalidate such certificate.” This summons was heard before *Erle*, J., on the 19th, and dismissed, with costs.

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On the 2nd of *November*, a similar application was made to the court of Queen’s Bench, in a cause of *Wearing v. Smith*; but the court refused to grant a rule. (a)

On the 12th of *November* a third summons was taken out in this cause, in the same terms as the first. This summons was heard before *Erle*, J., on the 14th, and dismissed; and on the 17th,

*W. H. Watson* obtained a rule calling upon the plaintiff to shew cause “why the defendant should not be forthwith discharged out of the custody of the keeper of the Queen’s Prison as to this action, a *fiat* in bankruptcy having issued against him, under which he had obtained his certificate of conformity, and the debt for which he was in custody being provable under the said *fiat*; or why a feigned issue should not be directed to be tried between the parties, upon such terms as the court should direct.” The rule was moved upon affidavits generally denying the alleged gaming since the commencement of the trading. It was submitted that the judge was bound to discharge the bankrupt on production of his certificate, or, at all events, to direct an issue: and *Davis v. Shapley* (b), *Jacobs v. Phillips* (c), *Yeo v. Allen* (d), and *Woolcott v. Leicester* (e), were cited.

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(a) See 16 *Law Journ. N. S.*, Q. B. 1.

(b) 1 *B. & Ad.* 54.

(c) 1 *C. M. & R.* 195., 4 *Tyrwh.* 652., 2 *Dowl. P. C.* 716.

(d) 3 *Dougl.* 214.

(e) 6 *Taunt.* 75.



*Channell*, Serjt., and *Bovill*, shewed cause against *Watson's* rule. (a) This is not an application to review the decision of the judge at chambers: it is an original application, which has already been decided by the court of Queen's Bench, in *Wearing v. Smith*, not to be warranted by the statute. The 37th section of the 5 & 6 Vict. c. 122. enacts "that every bankrupt who shall have duly surrendered and in all things conformed himself to the laws in force at the time of issuing the *fiat* in bankruptcy against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands made provable under the *fiat*, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as hereinafter mentioned," &c. "Provided always, and be it enacted (s. 38.) that no bankrupt shall be entitled to the certificate under this act, and that *any such certificate if obtained, shall be void*, if such bankrupt shall have lost, by any sort of gaming or wagering, in one day 20*l.*, or, within one year next preceding his bankruptcy, 200*l.*," &c. (b) The 39th section prescribes the mode of obtaining the certificate. And the 42nd enacts that "any bankrupt who shall, after such certificate shall have been confirmed, be arrested, or have any action brought against him for any debt, claim, or demand provable under the *fiat* against such bankrupt, shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and such bankrupt's certificate, and the confirmation thereof, shall be sufficient evidence of the trading,

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c. 122. s. 37.

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Section 42.

(a) The affidavits used in answer to the rule, alleged a number of acts of gaming, and losses to a large amount, as well after as before the defendant became a trader.

(b) Similar in this respect to the 6 G. 4. c. 16. s. 130.



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bankruptcy, *fiat*, and other proceedings precedent to the obtaining such certificate; and, if any such bankrupt shall be taken in *execution*, or detained in prison, for such debt, claim, or demand, where judgment has been obtained before the confirmation of his certificate, it shall be lawful *for any judge of the court* wherein judgment has been so obtained, on such bankrupt's producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt, without exacting any fee; and such officer shall be hereby indemnified for so doing." If it be said that this is substantially an appeal from the decision of *Erle*, J., the answer is, that the rule is not drawn up on reading the affidavits that were before the learned judge on the third summons. In order to avoid the certificate, it is not necessary that the losses at play should have been incurred whilst the party was a trader: none of the statutes contain any such limitation. [*Wilde*, C. J. Is there any difference, as to jurisdiction, between the 5 G. 2. c. 30., and 6 G. 4. c. 16., and the 5 & 6 Vict. c. 122. ?] By the 5 G. 2. c. 30. s. 13., where a certificated bankrupt had been taken in execution for a debt provable under the commission, power was given to "one or more of the judges" to discharge him upon production of his certificate. The language of the 126th section of the 6 G. 4. c. 16. is identical with that of the 5 & 6 Vict. c. 122. s. 42. In *Hughes v. Morley* (a), it was held that the clause in the 12th section of the 5 G. 2. c. 30., depriving the bankrupt of all benefit from his certificate, in the case of losses at play, was to be considered as a qualification restraining the operation of the 7th section; and that evidence of such losses might be given in a court of law, on the similitur to the general plea of bankruptcy. So, in

(a) 1 B. & Ald. 22.



*Horn v. Ion* (a), it was held to be a good answer to a plea of bankruptcy, that the certificate was obtained by fraud, though the enactment to that effect in the 5 G. 2. c. 30. s. 7. is not repeated in the 6 G. 4. c. 16. It is clear, therefore, that the certificate is not *conclusive*: and, under the circumstances here disclosed, it is altogether void. [*Wilde*, C. J. So far from considering the certificate conclusive, the court, in *Stacey v. Frederici* (b), —upon an application to discharge a defendant on common bail, on the ground of his having obtained his certificate, he having been arrested for a debt provable under the commission, —say, that, “as the validity of the certificate was disputed, they could not interfere in a summary way.”]

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*W. H. Watson* and *Taprell*, in support of the rule. The forty-second section of the 5 & 6 *Vict. c. 122.* entitles the bankrupt to be discharged from execution, by any judge of the court wherein judgment has been obtained, *on producing his certificate.* That section operates as a proviso on sect. 37., which makes the certificate a discharge from all debts provable under the *fiat.* The words “it shall be lawful” for the judge to order the discharge, are to be construed as compulsory, in favour of the liberty of the subject. In *Henderson v. Sherborne*, Lord *Abinger* says: (c) “The interpretation of statutes has always, in modern times, been highly favourable to the personal liberty of the subject, and I hope will always remain so.” [*Coltman*, J. Your construction would place the execution-debtor in a better situation than one in custody under mesne process; for, it would make the certificate an absolute discharge in the one case, and in the other only pleadable.] Such clearly was the opinion of the court in *Davis v. Shapley.* (d)

(a) 4 B. &amp; Ad. 78.

(b) 2 B. &amp; P. 390.

(c) 2 M. &amp; W. 239.

(d) 1 B. &amp; Ad. 54.



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If the construction contended for on the other side be correct, the bankrupt must be doomed to perpetual imprisonment, as long as any dishonest person can be found ready to make an affidavit which he can have no opportunity of answering. In *Barrow v. Poile* (a), Lord *Tenterden* says: "It is expressly enacted by the 121st section of the statute, that every bankrupt who shall have surrendered and conformed himself, and obtained his certificate, shall be discharged from all debts due by him when he became bankrupt, and from all demands provable under the commission. This judgment debt was clearly so provable. It is admitted, that, if an action had been brought on this judgment, the defendant might have pleaded his bankruptcy and given the certificate in evidence, and that the certificate would have been conclusive; and also, that, if he had been taken in execution upon the judgment, or detained in prison upon it, he might have been discharged by a judge, on production of his certificate, in which case also it would have been conclusive. But it is said the certificate is conclusive in these cases only. Whether the language of the 126th section is sufficiently general to include the present case, or not, does not seem to me to be very material; it points out the course of proceeding in particular instances, but it cannot control the general words of the 121st section; and, it being manifest that the plaintiff's demand is one which might have been proved under the commission, I think we should not give effect to the words of that section, which provides that the bankrupt obtaining his certificate shall be discharged from every demand provable under the commission, if we were to reject the present application, and put the defendant to the course which has been suggested"—viz. an *audita querelâ*. [*Wilde*, C. J. His

(a) 1 B. & Ad. 629.



lordship goes on to observe, that "if the certificate could be brought within any of the cases specified in the 130th section, where it is declared that a certificate, if obtained, shall be void, as, by gaming, or other misconduct of the bankrupt, the question would be very different." The certificate is conclusive, until set aside by the court of review.

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Then, has the *court* jurisdiction? It is submitted that it has. It was not the intention of the legislature to confer an exclusive jurisdiction upon a single judge at chambers. Besides, this is, in effect, an appeal against the decision of Mr. Justice *Erle*. When a judge refuses to grant that which a party is entitled to, he may always appeal to the court: *Johnstone v. Knowles*. (a) [*Coltman*, J. The jurisdiction of the court will not be disputed, if you shew that the judge was *bound* to discharge the defendant.] Independently of the forty-second section of the 6 & 7 *Vict. c. 122.*, the court has a general jurisdiction to discharge from execution a bankrupt, who has obtained his certificate. Many cases to this point are referred to in *Sadler v. Cleaver* (b), which is itself an authority for the position. [*Maule*, J. If you rely upon the general jurisdiction of the court, you cannot exclude inquiry.]

At all events, the court will direct an issue: *Robson v. Calze* (c); *Cook v. Jones* (d); *Harrod v. Benton*. (e)

WILDE, C. J., now said that the court had very anxiously considered the matter, but were not prepared to say that the defendant was entitled to be discharged. His lordship added that the court would look more fully into the authorities, and would give a definitive judgment next term.

*Cur. adv. vult.*

(a) 1 *Dowl. N. S.* 31.

(d) *Cowp.* 727.

(b) 7 *Bingh.* 769., 5 *M. & P.* 706.

(e) 8 *B. & C.* 217., 2 *M. & R.* 130.

(c) 1 *Dougl.* 228.



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WILDE, C. J., now delivered the judgment of the court.

This is an application to discharge the defendant out of custody, on the ground that he has obtained his certificate of conformity under the statute 5 & 6 *Vict. c. 122. s. 37*. The motion is founded upon the forty-second section of the statute, which enacts “that any bankrupt who shall, after such certificate” (meaning the certificate before referred to,) “shall have been confirmed, be arrested, or have any action brought against him for any debt, claim, or demand provable under the *fiat* against such bankrupt, shall be discharged upon entering an appearance:” then, after giving the form of plea, the section goes on to provide that “such bankrupt’s certificate, and the confirmation thereof, shall be sufficient evidence of the trading, &c.; and, if any such bankrupt shall be taken in execution or detained in prison for such debt, claim, or demand, where judgment has been obtained before the confirmation of his certificate, it shall be lawful for *any judge* of the court wherein judgment has been so obtained, on such bankrupt’s producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt, without exacting any fee; and such officer shall be hereby indemnified for so doing.”

The present is an original application under the authority of this act; and not a case in which the party has been before a judge at chambers, and is now appealing against his decision. It is true that the parties have been before my brother *Erle* upon a summons, and that he has pronounced an opinion on the case. This, however, is not a rule to rescind his order; nor was the application to him founded upon the same materials that have been presented to us. ‘The question whether the court has any original jurisdiction, has been before



the court of Queen's Bench : and that court has determined that no such jurisdiction exists. (a) It may be that no jurisdiction exists on the ground presented to the court of Queen's Bench in that case. But the question here is, whether the courts at *Westminster* have an original jurisdiction under the earlier part of the forty-second section. The books of practice contain very many cases of applications to set aside writs of *fi. fa.* issued after certificate in respect of a debt provable under the commission, for which there is no express authority in any of the statutes. The courts, however, have said that, as the debt was provable, the bankrupt was discharged, not merely from the debt, but from all remedies for its recovery. The cases of *Davis v. Shapley* and *Barrow v. Poile* are both strongly in point for that. Both those cases arose on the 121st section of the 6 G. 4. c. 16., in which there is nothing that is at all inconsistent in this respect with the statute of 5 & 6 Vict. c. 122. s. 37. It appears, therefore, from these two cases, in terms, and, impliedly, from many others that might be referred to, that the court will interfere to prevent its process from being improperly used to enforce a claim against a bankrupt that might have been proved under the *fiat*. Without at all seeking to impugn the doctrine of the court of Queen's Bench, it may well be that there is an original jurisdiction with respect to the first part of the section. But, considering this as in the nature of an appeal, how stands the matter? By the 5 G. 2. c. 30. s. 12. it is declared that a bankrupt who shall have lost by gaming 5*l.* in any one day, or 100*l.* within twelve months of his bankruptcy, shall lose all privilege or benefit from his certificate : while, at the same time, it is enacted by sects. 7. 13. that a bankrupt who has conformed, shall be discharged from all debts provable under

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(a) *Wearing v. Smith*, 16 *Law. J., N. S., Q. B.* 1.



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6 G. 4. c. 16.  
s. 121.

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the commission, and be entitled to be released from arrest on mesne or final process. The 121st section of the 6 G. 4. c. 16. discharges the bankrupt "from all debts due by him when he became bankrupt, and from all claims and demands hereby made provable under the commission, in case he shall obtain a certificate of conformity, so signed and allowed, and subject to such provisions as thereafter directed:" so that the clause which gives the discharge, makes it subject to the subsequent provisions. The 126th section enacts that "any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him, for any debt, claim, or demand thereby made provable under the commission against such bankrupt, shall be discharged upon common bail, and may plead, in general, that the cause of action accrued before he became bankrupt, and may give the act and the special matter in evidence; and such bankrupt's certificate, and the allowance thereof, shall be sufficient evidence of the trading, bankruptcy, commission, and other proceedings precedent to the obtaining such certificate; and, if any such bankrupt shall be taken in execution, or detained in prison, for such debt, claim, or demand, where judgment has been obtained before the allowance of his certificate, it shall be lawful for any judge of the court wherein judgment has been so obtained, on such bankrupt's producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt, without exacting any fee, and such officer shall be hereby indemnified for so doing." But, by s. 130. it is enacted, that "no bankrupt shall be entitled to his certificate, or to be paid any such allowance (as provided by s. 128.), and any certificate, if obtained, *shall be void*, if such bankrupt shall have lost, by any sort of gaming or wagering, in one day 20*l.*, or within one year next preceding his



bankruptcy, 200*l.*" &c. Then comes the 5 & 6 *Vict.* 1847.  
*c.* 122., which, by s. 2., continues in force all the pro-  
visions of the 6 *G.* 4. *c.* 16. that are not inconsistent, or  
at variance, with the provisions of that act; and by s. 37. **CLARK**  
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enacts that "every bankrupt who shall have duly sur- 5 & 6 *Vict.*  
rendered, and in all things conformed himself to the laws *c.* 122. s. 2.  
in force at the time of issuing the *fiat* in bankruptcy Section 37.  
against him, shall be discharged from all debts due by  
him when he became bankrupt, and from all claims and  
demands made provable under the *fiat*, in case he shall  
obtain a certificate of such conformity so signed and  
allowed, and subject to such provisions, as thereafter  
mentioned," &c. Section 38. enacts "that no bankrupt Section 38.  
shall be entitled to the certificate under that act, and  
that any such certificate, if obtained, shall be void, if  
such bankrupt shall have lost, by any sort of gaming or  
wagering, in one day 20*l.*, or, within one year next pre-  
ceding his bankruptcy, 200*l.*" &c. Then the thirty-ninth Section 39.  
section, which prescribes the mode of obtaining such  
certificate of conformity, contains a proviso "that no  
certificate shall be such discharge, unless such court (of  
bankruptcy) shall, in writing under hand and seal, cer-  
tify to the court of review that such bankrupt has made  
a full discovery of his estate and effects, and in all  
things conformed *as aforesaid*, and that there does not  
appear any reason to doubt the truth or fullness of such  
discovery; and unless the bankrupt make oath in writing  
that such certificate was obtained fairly and without  
fraud," &c. And the forty-second section enacts "that Section 42.  
any bankrupt who shall, after such certificate shall have  
been confirmed, be arrested, or have any action brought  
against him for any debt, claim, or demand provable  
under the *fiat* against such bankrupt, shall be discharged  
upon entering an appearance, and may plead, in general,  
that the cause of action accrued before he became bank-  
rupt, and may give this act and the special matter in



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evidence; and such bankrupt's certificate, and the confirmation thereof, shall be sufficient evidence of the trading, bankruptcy, *fiat*, and other proceedings precedent to the obtaining such certificate; and, if any such bankrupt shall be taken in execution or detained in prison for such debt, claim, or demand, where judgment has been obtained before the confirmation of his certificate, it shall be lawful for any judge of the court wherein judgment has been so obtained, on such bankrupt's producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt, without exacting any fee; and such officer shall be hereby indemnified for so doing." On the part of the defendant, it is insisted that the effect of these provisions is, that the certificate, when once obtained, shall not be questioned upon a motion for the bankrupt's discharge; but that the creditor must seek his remedy, if he has any, by an action upon the judgment. It is to be observed, however, that this application is addressed to the court with reference to its general jurisdiction. If the bankrupt is entitled to an *auditâ querelâ*, it must be subject to all the rights of the creditor; one of which would be, the right to plead thereto that the certificate was void by reason of gaming: and, if that be so, must not the same answer be open to him when the bankrupt applies to the court for relief in a summary way? The question whether the mere production of the certificate was sufficient to entitle the bankrupt to be discharged from execution, was before the court of Queen's Bench on *Friday* last, in the case of *Wearing v. Smith (a)*, when it was determined that it was not; but that it was the duty of the court to see that the certificate is not avoided by any of the circumstances pointed out in the

(a) 16 *Law Journ., N. S., Q. B.* 173.



act; and that, if the creditor shews, to the satisfaction of the court, that the bankrupt has been guilty of any act, the commission of which is declared to render the certificate void, he is not entitled to such summary relief. The answer there set up, as here, was, that the bankrupt had been guilty of gaming, and had thereby sustained losses to the extent mentioned in the statute. The gaming was denied by the bankrupt. But the court, exercising its judgment on the materials presented to it, thought the charge of gaming proved, and consequently discharged the rule. In the present case, affidavits have been filed in answer to the rule, imputing to the bankrupt gaming to a very considerable extent. To these affidavits, no answer whatever is attempted to be given.<sup>(a)</sup> It is insisted on his part that he is not bound to answer them, the certificate being conclusive until set aside by the court of review. This, therefore, is not a case of controverted facts. Upon the affidavits, we think there is no reasonable ground for doubting that the charge of gaming is well founded: and, upon the authority of the case last cited, we hold that the creditor was at liberty upon this motion to dispute the validity of the certificate on that ground, and therefore discharge this rule.

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Rule discharged, with costs.

(a) *Quære* as to the existence of any opportunity of replying to these affidavits. The charges do appear to have been answered by anticipation, vide *suprà*, 983.

END OF HILARY TERM.



**ADDENDUM.**

See notes A. and B., at the end of the Fourth Volume.





# AN INDEX

TO

## THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

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### ABATEMENT.

*See* PLEADING, I. 2.

### ACCORD AND SATISFACTION.

To a count by indorsee against acceptor of a bill of exchange, the defendant pleaded, that, after the accruing of the causes of action in the declaration, and before the commencement of the suit, the defendant and plaintiff accounted together of and concerning the said causes of action, *and all other claims and demands then being between them*; and that, on that accounting, a certain sum only was found due to the plaintiff, which sum the defendant paid, and the plaintiff received, in full satisfaction of the sum so due and owing as last aforesaid.

The plaintiff replied, that he

and the defendant did not account together of and concerning the causes of action in the declaration, *and of all other claims and demands then being between the plaintiff and the defendant, modo et formâ*:—

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Principle upon which new cause of action by. 212. n.

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An affidavit intituled "*W. W.*, carrying on business under the name or style of *W. T. & Co.*, plaintiff, and *C. F.*, defendant"—the plaintiff having so described himself in the writ, — was held sufficient. *White v. Feltham.* Page 658

II. *Form of Jurat.*

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Held, that the agreement and indorsement might be looked at together for the purpose of making out a consideration for the defendant's promise. *Coldham v. Showler.* Page 312

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*See* PARLIAMENT. I.

## AMENDMENT.

I. *At Nisi Prius*, under 3 & 4 *W. 4.* c. 42. s. 23.

In case against a surveyor of highways, appointed under the 7 & 8 *Vict. c. 84.*, for the following words alleged to have been spoken by him at a public auction, in reference to certain unfinished houses at a place called *Agar Town*, which the plaintiff had put up for sale—"My object in attending this sale, is, to inform purchasers, if there be any here present, that I shall not allow purchasers (meaning persons who then might be disposed to purchase at the said sale the said house of the plaintiff, so exposed for sale as aforesaid,) to be finished or occupied, until the roads are made good in *Agar*



## AMENDMENT.

*Town.* I have no power to compel any one to make the roads; but I have power to stop the buildings until the roads are made. If there shall be any purchasers, they will have to keep the carcasses in their unfinished state until the roads are made," — the judge at the trial allowed the declaration to be amended, under the 3 & 4 *W. 4. c. 42. s. 23.*, by substituting for the words in *italic*, the words "the houses:" — Held, that such amendment was properly allowed. *Pater v. Baker.*

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### II. *After Judgment on Demurrer.*

The court refused to allow a replication to be amended after the lapse of a year after judgment pronounced on demurrer, the case having previously stood over that the parties might mutually agree to amend, and both having declined to do so. *Hammond v. Colls.*

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be deemed and taken to be *debts*, within the meaning of the 5 & 6 *Vict. c. 116.*, and of that act, is not retrospective. *Thompson v. Lack.*

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1. The court will not set aside, or refer back, an award for an objection in point of law not apparent on the face of it: as, upon a suggestion that the arbitrator improperly treated as a penalty that which was, by the express contract of the parties, stipulated and ascertained damages. *Fuller v. Fenwick.* 705
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*Within 32 H. 8. c. 34.*

1. The grantee of part of the grantor's reversionary interest in the whole of the property in which a *particular estate* — as a term of years — has been created, is an assignee of the reversion within the 32 H. 8. c. 34.; but the grantee of the whole reversionary interest in part of the property, is not such an assignee. *Wright v. Burroughes.* Page 685
2. *A.* in February, 1840, demised to *B.* for twenty-one years as from Christmas then last. *B.* in January, 1841, demised to *D.* for three years, and, in April, 1842, demised to *E.* for the whole of *B.*'s term, less one day: — Held, that *E.* was an assignee of the reversion of the premises demised, within the statute. *Ibid.*
3. A declaration in trespass alleged that the defendant *with force and arms* broke and entered the plaintiff's dwelling-house.  
Plea — that *A.*, being seised in in fee of the dwelling-house, demised it to *B.* for twenty-one years; that *B.* demised to the defendant for all the residue of his term, wanting one day; and that the plaintiff, claiming title under colour of a charter of demise, pretended to have been thereof made to him by *A.*, for life, be-



## ASSIGNEE OF REVERSION.

fore the making of the demise by *A.* to *B.*, — whereas nothing ever passed by virtue of that charter,— during the continuance of the several terms, entered into the dwelling-house, and was thereof possessed; whereupon the defendant entered, &c. Replication — that, before the making of the demise from *B.* to the defendant, and whilst *B.* was possessed of the term, *B.* demised the premises to *D.* for three years; and that *D.* assigned his term to the plaintiff, who thereupon became possessed, and remained so until the committing of the trespasses. Rejoinder — that the demise to *D.* was subject to a condition, that the condition was broken, and that the defendant entered for the breach: — Held — first, that the defendant, being an assignee of the reversion within the 32 *H. 8. c. 34.*, could avail himself of the breach of condition — secondly, that the allegation of a mere *pretended* charter of demise did not show title in the plaintiff — thirdly, that the allegation that the trespass had been committed *with force and arms*, did not import a *forcible* entry — fourthly, that the replication was not bad for departure. *Ibid.*

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### ATTACHMENT.

*For Non-performance of Award —*  
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Though the court will, in general, where a defendant is prejudiced by the act of an attorney in acting for him without authority, leave him to his remedy against the attorney, if solvent; that rule does not apply, where the defendant is in custody by reason of the unauthorised act, or where the plaintiff or his attorney is party to the wrong. *Hambidge v. De la Crouée.* Page 742

### II. *Lien of.*

1. The lien of an attorney attaches upon money received by way of compromise; though the verdict and judgment be against his client. *Davies, dem., Lowndes, ten.* 823
2. Upon an application to give effect to such lien, the affidavit should show the amount claimed by the attorney. *Ibid.*

### III. *Changing.*

1. Upon an application to change the attorney, where the client is unacquainted with the English language, the affidavits must clearly show that the purport and object of the motion are known to and sanctioned by the client. *Davies, dem., Lowndes, ten.* 808
2. It is no objection to such an application, that it is made after final judgment. *Ibid.*



## AWARD.

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## BAILIFF'S FEES.

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## BANKER.

*Lien of.*

1. The general lien of bankers on securities of their customers deposited with them, is part of the law-merchant, and to be taken judicial notice of as such. *Brandao v. Barnett.* Page 519
2. *A.* bought on account of *B.*, and with *B.*'s money, certain exchequer bills, which *A.* deposited in a box that he kept at his bankers', himself retaining the key. Whenever it became necessary to receive the interest on the exchequer bills, and to exchange them for new ones, *A.* was in the habit of taking them out of the box and giving them to the bankers for that purpose (such being the usual course of business); which being accomplished, the new exchequer bills were, as soon as conveniently might be, handed over to and locked up by *A.* in the box, the amount of interest received by the bankers being passed to the credit of *A.*'s account. The exchequer bills themselves were never entered to *A.*'s account, nor had the bankers any

## BANKING COMPANY.

notice or knowledge that they were not the property of *A.* himself.

On the 1st of *December*, 1836, *A.* took the exchequer bills out of the box, and delivered them to the bankers, for the purpose of receiving the interest and exchanging them for new ones. The bills were accordingly exchanged; but the new bills (*A.* being absent from business on account of illness) remained in the possession of the bankers down to the time of *A.*'s failure, on the 23rd of *January*, 1837, his account in the mean time having been considerably overdrawn:—

Held, in an action at the suit of *B.*, the true owner (reversing the judgment of the Exchequer Chamber), that the bankers had no lien upon these exchequer bills for the general balance due to them from *A.*, although such securities are transferable by delivery; the circumstances under which they came to their hands being inconsistent with the existence of a general lien. *Ibid.*

## BANKING COMPANY.

*Scire Facias* to charge Members, under 7 G. 4. c. 46.

1. The fact of a *scire facias*, to charge a party as a member of a banking co-partnership, under the 7 G. 4. c. 46. s. 13., having been issued without leave of the court, in a case where such leave is neces-



sary, or being ambiguous on the face of it, is a mere irregularity, to be taken advantage of on motion, and promptly. *Ricketts v. Bowhay.* Page 889

2. But, where the writ stated that *A. B. and C. D.* "*were at the time of the judgment and still are*" members of the co-partnership, and prayed execution against them; and the declaration recited a *scire facias*, charging them as executrix and administrator respectively of persons who were members *at the time of their respective deaths* (which took place before the judgment), and praying execution of the goods and chattels of the deceased in the hands of *A. B. and C. D.* as executrix and administrator to be administered:—Held, that this misrecital was a substantial variance, the right to take advantage of which was not waived by the defendants in the *scire facias* obtaining orders for time to plead. *Ibid.*

3. *Quære*, whether under this statute recourse can be had against the estates of deceased members of the co-partnership. *Ibid.*

*And see* PARTNERS, III.

## BANKRUPT.

### I. *Proof of Annuity.*

The provision in 7 & 8 *Vict. c. 96. s. 25.*, that every sum of money payable by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities, shall

be deemed and taken to be *debts*, within the meaning of the 5 & 6 *Vict. c. 116.*, and of that act, is not retrospective. *Thompson v. Lack.* Page 540

### II. *Certificate.*

1. *Discharge from Execution.*] — By a charter-party entered into between *A. and B.*, it was provided that the ship, which was described to be of the burthen of 310 tons, or thereabouts, should proceed to *Ichaboe*, and there receive a full and complete cargo of guano (which was to be taken to the ship's boats at the merchant's risk and expense, the captain to render all possible aid with his crew in rigging stages), not exceeding what she could reasonably stow and carry, and therewith proceed to a port in the United Kingdom; and *B.* agreed to load the vessel, and to pay freight 4*l.* 10*s.* *per* ton, and 5*l.* *per* day demurrage. If labourers went out in the vessel, the owner to be allowed 1*s.* *per* man *per diem*. Penalty for breach, 1800*l.* Should the vessel arrive on or before a given day, *B.* was to pay 50*l.* over and above the specified freight.

An action having been brought against *B.*, in *April*, 1845, for not providing a cargo pursuant to the charter-party, judgment by default was signed on the 1st of *July*, and, on the 26th of *November*, the damages were assessed at 1644*l.* 3*s.* 9*d.*, and final judgment was signed on the 8th of *December*.



On the 16th of *May*, 1845, a *fiat* issued against *B.*, under which he obtained his certificate on the 22nd of *August*, subject to a suspension of six months from the 8th of *July*.

*B.* having been taken upon a *ca. sa.* on the 3rd of *February*, 1846:—

Held, that this was not a debt or demand provable under the *fiat* and, consequently, that *B.* was not entitled to be discharged from custody. *Woolley v. Smith.*

Page 610

2. *Void by Reason of Gaming.*]—

Upon an application at chambers, under the 5 & 6 *Vict. c. 122. s. 42.*, to discharge a bankrupt who has obtained his certificate, from execution for a demand provable under the *fiat*, it is competent to the judge to receive affidavits to show that the certificate is void by reason of gaming, under *s. 38.* *Clark v. Smith.* 982

3. In such a case, the *court* has no *original* jurisdiction. *Ibid.*

III. *Proceedings on Bond given under 1 & 2 Vict. c. 110. s. 8.*

1. To an action against a surety upon a bond given under the 1 & 2 *Vict. c. 110. s. 8.*, the defendant pleaded, that, after the making of the bond, and before the commencement of the suit, the plaintiff brought an action against the principal in *B. R.*, and recovered against him, and issued a *ca. sa.* thereon, under which the principal was taken; that the latter thereupon caused himself to

be brought up by *habeas corpus* before a judge, “who, then, and before any breach of the condition of the bond, and before the time for the principal rendering himself according to the practice of the said court and the said condition had expired, and according to the practice of the said court, committed him to the custody of the marshal, in execution at the suit of the plaintiff upon the said judgment;” that the marshal received and kept him in execution as aforesaid, according to the practice of the said court, until and after the return day of the *ca. sa.*, for a long space of time, to wit, hitherto; and that, from the time of the recovery of the said judgment, until he was so taken under the *ca. sa.*, the principal was always ready and willing to render himself according to the practice of the court and the said condition, and, whilst he remained in custody as aforesaid, was ready and willing to render himself, and would have rendered himself accordingly, *but that he was prevented* by the plaintiff from so doing in manner aforesaid:—

Held, that, if the plea was to be regarded as a plea of *performance*, it was bad, for not stating distinctly that the principal did render himself according to the practice of the court; and that, if it was to be considered as a plea in *excuse*, it was equally bad, for not distinctly alleging that the act of the plaintiff in suing out the



## BANKRUPT.

*ca. sa.* against the principal, made it impossible for him to render—the court not taking judicial notice that the issuing of that writ was any impediment to a render. *Hayward v. Bennett.*

Page 404.

2. The court allowed an additional plea to be pleaded, after judgment for the plaintiff on demurrer, and without affidavit of merits. *Hayward v. Bennett.* 418

## BARON AND FEME.

See HUSBAND AND WIFE.

## BILL OF EXCEPTIONS.

### *Sealing.*

1. Where a party has lost the benefit of a bill of exceptions tendered to the ruling of a judge at nisi prius, or at the assizes, by the death of the judge, and without any default on his own part, it is not competent to another judge of the court out of which the record issues, to seal the bill of exceptions. *Newton v. Boodle.* 795
2. But, in such a case, the court will, where the circumstances warrant it, allow the party to move for a new trial, although the time for so doing has elapsed. *Ibid.*  
*And see PRACTICE, XI.*

## BILLS AND NOTES.

### I. *General Allegation of Presentment.*

1. In a count by an indorsee against the drawer of a bill drawn payable in London, the venue being laid

## BILLS AND NOTES. 1005

in London, a general allegation of presentment was held to be a sufficient allegation of a presentment in London, since the rule of Hilary term, 4 IV. 4. r. 8. *Boydell v. Harkness.* Page 168

2. *Quære*, whether the defect would have been aided by the defendant's pleading over, if the venue had been laid elsewhere. *Ibid.*

### II. *Omission of Christian Name of Party.*

1. A count on a bill of exchange — by indorsee against acceptor — alleged that “one *I. B. Doe*,” on &c., made his bill of exchange, &c. — The court refused to set aside as frivolous a demurrer assigning for cause that the drawer was described in the count by the initials of his christian name only, without alleging any excuse for the omission of his christian name, or shewing that he was so designated in the bill. *Turner v. Fitt.* 701
2. *Semble*, that the omission is fatal on special demurrer. *Ibid.*

### III. *Coverture of Payee.*

To a count against the maker of a promissory note, he pleaded, *in bar*, that, at the time of making the note, the plaintiff was the wife of *A.*, that the consideration for the note was the loan of money of *A.* advanced by the plaintiff to the defendant without *A.*'s authority and against his will, that the plaintiff took the note, and held and *still holds* the same, without the autho-



rity and against the will of *A.*, and that he never had any property in, or right to, the note:—Held, an informal plea of coverture. *Guyard v. Sutton.* Page 153

IV. *Rule to Compute*—See PRACTICE, IV.

And see PARTNERS, II. 2, 3, 4.

BOND.

I. *Made in France*—See PLEADING, III. 2.

II. *Staying Proceedings.*

Staying proceedings in debt on bond, under the 4 & 5 Ann, c. 16. s. 13. *Robinson v. Brown.* 54

CASE.

I. *For Negligence.*

1. A gas company incorporated by act of parliament, with the usual powers to take up pavements, &c., for the purpose of laying down and repairing mains, pipes, &c., had for some years supplied gas to a house belonging to the plaintiff; the *only* means of shutting it off being by a stop-cock *within* the house, the key of which was kept by the occupier. The last tenant, on quitting, gave notice to the company that he should not require any further supply; and one of their workmen, at his request, removed a chandelier from one of the rooms, leaving the end

CASE.

of the pipe properly secured. The internal fittings were the property of the plaintiff. Whilst the house remained untenanted, the gas by some unexplained means escaped, and an explosion took place, by which the house was considerably damaged.

In case against the company, alleging a breach of duty on their part in not taking proper means to prevent the influx of the gas into the house, the judge having, upon the above facts, directed a nonsuit, the court declined to interfere. *Holden v. The Liverpool New Gas Company.* Page 1

2. Negligence on the part of the plaintiff, was held to be an admissible defence under the plea of not guilty. *Ibid.*

3. In case against a railway company, for so negligently managing and conducting an engine, that certain premises of the plaintiff adjoining the line were destroyed by fire emitted from the engine, evidence is admissible for the purpose of shewing that other engines belonging to the company, upon other occasions, in passing along the line, threw sparks or ignited matter to a sufficient distance to reach the building in question—without shewing the precise circumstances under which this occurred. *Piggot v. Eastern-Counties-Railway Company.* 229

4. The fact of premises being fired by sparks emitted from a passing engine, is *prima facie* evidence of negligence on the part of the com-



## CASE.

pany, rendering it incumbent on them to shew that some precautions had been adopted by them, reasonably calculated to prevent such accidents. *Ibid.*

### II. *For Malicious Arrest.*

In case for maliciously, and without reasonable or probable cause, causing the plaintiff to be arrested on a *capias* under the statute 1 & 2 Vict. c. 110. s. 3., the order for which had been obtained upon an affidavit not fairly disclosing the nature of the contract, for the alleged breach of which the defendants were suing — the judge having stated, that, in his opinion, the plaintiff had failed to make out a want of reasonable and probable cause, told the jury, that, to entitle the plaintiff to a verdict, they must be satisfied that there was a total want of reasonable and probable cause, and that the defendants had acted with malice: — Held, a misdirection. *Gibbons v. Alison.* 181

## CERTIFICATE.

See BANKRUPT, II.

## CHARTERPARTY.

See BANKRUPT, II. 1.

## CHRISTIAN NAME.

Omission of — See BILLS AND NOTES, II.

## CHURCHWARDENS. 1007

### CHURCHWARDENS.

#### *Election of.*

From the year 1648 (the earliest period of which any records could be found), the parish of *St. S. W.*, in the city of *London*, had been governed by a select vestry, composed of the rector and churchwardens, and those inhabitants who had served the office of churchwarden, or paid a fine for not serving. Down to the year 1734 (except in two or three instances, and between 1667 and 1672, when the affairs of the parish were deranged by the great fire of *London*), the course had been, for the select vestry annually to choose, from among the parishioners at large, one person to act as junior churchwarden, who at the end of the year succeeded to the office of senior churchwarden. From 1734 to 1775, no records of the parish could be found. And from 1775 to 1824, the same course had been pursued, except in four instances. The number at the vestry on these occasions was, sometimes sixteen, sometimes only three.

Upon a special case, leaving it to the court to draw such inferences from the facts as a jury would be warranted in drawing: —

Held, that a repeated re-election of the same person to the office of senior churchwarden, without any necessity for so doing, was in violation of the custom, and, consequently, void. *Gibbs v. Flight.* Page 581



## 1008 CO-CONTRACTOR.

### CO-CONTRACTOR.

*Plea of Non-joinder of—See PLEADING, I. 2.*

### COLLIERY.

*See PARTNERS, I. 3.*

### COLOUR.

*See ASSIGNEE OF REVERSION, 3.*

### COMMITTEE-MAN.

*See EVIDENCE, II.*

### CONCLUSION OF PLEA.

*See PLEADING, I. 2.*

### CONDITION PRECEDENT.

*See SHIP-BROKER.*

### CONSCIENCE, COURT OF.

*See COURT OF REQUESTS.*

### CONSENT.

*See SUMMONS.*

### CONSIDERATION.

*See AGREEMENT.*

### CONSOLIDATION.

*See PRACTICE, VIII. 4. 5.*

### CONTRACT.

*Construction of.*

1. *A. contracted to buy of B. certain cement, in casks and bags, at a given price, for cash; B. agreeing to allow A. 3s. 6d. for each cask,*

## COPYHOLDS.

and 2s. 6d. for each bag, that should be returned perfect.

In an action by *A.* against *B.* for not accepting and paying for the casks and bags, the declaration averred that *A.* duly paid *B.* for the said cement, and for the casks and bags; and that, although *A.* was ready and willing, and tendered and offered, to return the casks and bags, *B.* refused to accept or pay for them.

*B.* pleaded that *A.* did not duly pay *B.* for the said cement, casks, and bags; and that *A.* was not ready and willing to return the casks and bags to *B.* within a reasonable time:—

Held, that a payment of the price of the cement by *A.* after an action brought against him, was a payment according to the contract, so as to entitle him to complain of a breach of the contract on the part of *B.* *Nelson v. Pattrick.* Page 772

2. Held, also, that *A.* was not bound to prove that he was ready to return *all* the casks and bags—the allegation being in this respect divisible. *Ibid.*

### CONVEYANCE BY MARRIED WOMAN.

*See HUSBAND AND WIFE, III.*

## COPYHOLDS.

Not within the statute 59 G. 3. c. 12. s. 17. *Doe d. Bailey v. Foster.* 215  
*And see HUSBAND AND WIFE, II.*



## COPYRIGHT.

*Dramatic Work.*

1. In an action upon the statute 3 & 4 W. 4. c. 15. s. 2. for penalties for the representation of a dramatic piece of the plaintiff's at a "place of dramatic entertainment," without his consent, it is sufficient to describe the offence in the words of the act. *Lee v. Simpson.*

Page 871

2. An introduction to a pantomime, — that is, the only *written* part of the entertainment, — is within the protection of the act. *Ibid.*
3. To constitute the *offence*, it is not necessary to shew, nor need the declaration aver, that the defendant *knowingly* invaded the plaintiff's right. *Ibid.*

*And see VENUE.*

## COSTS.

I. *In an Action upon a Judgment.*

Upon moving for a rule for costs under the statute 43 G. 3. c. 46. s. 4. in an action upon a judgment, an affidavit shewing the reason for adopting that course is indispensable. *Revell v. Wetherell.* 321

II. *Of Demurrer* — See PRACTICE, XII. 2. 3.III. *Taxation of.*

1. *Of Notice of Action.*] — The sum indorsed on the writ for costs was 2*l.* 5*s.* only. On taxation the master allowed 133*l.* 12*s.* 2*d.* costs in respect of the notice of action ;

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the only objection urged before him being, that the plaintiff was not entitled to any costs incurred prior to the issuing of the writ, no exception being taken as to the amount. The allowance of costs for the notice of action was held to be proper ; and the court refused to enter upon the question of amount. *Kent v. The Great-Western-Railway Company.*

Page 714

2. *Affidavits on Motion for a Review.*]

Upon a motion to review a taxation, the affidavits ought distinctly to point to the particular objection, and to shew that the attention of the officer was called to it. *Per Wilde, C. J., in Kent v. The Great-Western-Railway Company.* 724

3. *Subsistence Money.*] — In an action for breach of a charter-party, the trial having been postponed at the instance of the defendants, the plaintiff detained the captain of the vessel in this country for a period of 300 days, having been advised by counsel that he could not safely examine him under the 1 W. 4. c. 22., the defendants having intimated an intention to call witnesses to impugn his conduct : — Held, that, upon taxation of costs, the plaintiff was entitled to subsistence money for the witness, during the whole period of his detention. *Evans v. Watson.*

327

IV. *Security for Costs* — See INTERPLEADER.



## 1010 COUNTY COURT.

### COUNTY COURT.

#### *Jurisdiction of.*

1. The jurisdiction of the county-court is ousted by a plea or cognisance, setting up a title to the freehold, although no issue be taken on that part of the plea or cognisance. *Tinniswood v. Pattison.* Page 243
2. Where, therefore, the defendant in replevin made cognisance as bailiff of *A.*, alleging that the *locus in quo* was the freehold of *A.*, and that he, as bailiff, took the cattle &c. damage feasant; and the plaintiff pleaded that the defendant was not the bailiff of *A.*, and did not, as such bailiff, take the cattle, &c.; and issue was joined on this plea: — Held, that the subsequent proceedings in the county-court were *coram non judice*, and void. *Ibid.*

### COURT.

*Style of* — See JUDGMENT.

### COURT OF REQUESTS.

#### *Form of Affidavit on Motion for Suggestion.*

- 23 G. 2. c. 33. s. 19.] — Upon a motion for a suggestion under the *Middlesex* court of requests act (23 G. 2. c. 33. s. 19), the defendant, in his affidavit, described himself as “of No. 51. *Bedford Row*, *Holborn*, in the county of *Middlesex* ;” and alleged that he, “before and at the commencement of the suit, was, and ever

## COVERTURE.

since had been, and still was, inhabiting and resident in *Bedford Row* aforesaid, and that he, for and during all that time, had been, and still was, liable to be summoned to the court of requests held at *Kingsgate Street*, *Holborn*, aforesaid, and that the cause of action, and every part thereof, arose within the jurisdiction of the said court:” —

Held, that this affidavit did not allege, with sufficient distinctness, that the defendant resided in *Bedford Row*, in the county of *Middlesex*, or that the court of requests held at *Kingsgate Street*, was the *Middlesex* court of requests. *Thorne v. Jackson.* Page 661

## COVENANT.

By indenture dated the 17th of *November*, 1845, reciting that *A.* was indebted to *B.* in 100*l.*, *A.* assigned to *B.* all the goods, fixtures, tools, &c., which then were, or at any time during the continuance of that security should be, in and upon certain premises, to have, receive, and take the said goods, &c., thereby assigned, *as per schedule*, unto *B.* &c. The deed contained a covenant by *A.* for payment of the 100*l.* on the 8th of *February*, 1846: — Held, that, in an action of covenant for non-payment of the money, *B.* was not bound to produce the schedule. *Daines v. Heath.* 938

## COVERTURE.

See *BILLS AND NOTES*, III.



## CUSTOMS.

### CUSTOMS.

*Parochial* — See CHURCHWARDENS.

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### DAGUERREOTYPE.

See LETTERS PATENT, II.

### DECEIT.

*Practised on the Crown*, 129. n.

### DE INJURIA.

See PLEADING, III. 2.

### DEMURRER.

I. *Right to begin*, 76. n.

II. *Frivolous* — See BILLS AND NOTES, II.

### DEPARTURE.

See ASSIGNEE OF REVERSION, 3.

## DEVISE.

I. *Construction of*.

1. *Estate for Life.*]— Testator devised lands to his son for life, with remainders in strict settlement to his issue; remainder to testator's grandson *A.*, for life, remainder in strict settlement to his issue; "and, for default of such issue, then to the use of my grandchildren, *B.*, *C.*, *D.*, and *E.* (brothers and sisters of my grandson *A.*), if they shall happen to be living at the time of his decease, for their lives and the life of the survivor, of them, to take as

## DEVISE.

1011

tenants in common, and not as joint-tenants; and, from and after their several deceases, and the decease of the survivor of them the said *B.*, *C.*, *D.*, and *E.*, to the use of the first and all and every the son and sons of the body and bodies of my said grandchildren, severally and successively and in remainder, one after another, as they and every of them shall be in priority of birth and seniority of age, and of the several and respective heirs of the body and bodies of all and every such son and sons issuing, the elder of such sons, and the heirs of his body, being always preferred and to take before the younger of them and the heirs of his and their body and bodies, to take as tenants in common, and not as joint-tenants;" and, for want or in default of such issue, to all and every the daughter and daughters of the four grandchildren, in like manner: "and, in case either of my said grandchildren *B.*, *C.*, *D.*, and *E.*, shall happen to die, leaving no issue behind him, her, or them, then *my will and meaning is*, that all and singular the premises herein lastly devised, shall go and remain to the survivor of them, and the heirs of his or her body lawfully to be begotten, *in manner aforesaid*; and, on failure of issue of either of their bodies lawfully begotten, then I give, devise, and bequeath the same premises to the use of the children of my brothers *F.* and *G.*" &c.



The testator's grandson *C.* survived his brothers and sisters, and entered into possession, the testator's son, and his grandson *A.*, having both died without issue:—

Held, that *C.* took an estate for life only; the effect of these words—"shall go and remain to the survivor of them, and the heirs of his or her body lawfully to be begotten *in manner aforesaid*," being, to bring the lands, in the event to which the clause in which they were found applied, within the preceding clause, which gave life estates to the grandchildren, with remainders in tail to their sons and daughters; and there being no other part of the will to which the words of reference, "*in manner aforesaid*," could be applied. *Doe, d. Woodall v. Woodall.* Page 349

2. *Estate in Fee.*]—*A.*, by a will (executed before the 1st January 1838), devised as follows:—"I give and bequeath to my son *B.* my moiety of the house he now lives in, and all my personal property in his keeping:"—Held, that *B.* took the moiety of the house *in fee.* *Doe v. Fawcett.* 274

II. *Appointment by Wife during Coverture* — See HUSBAND AND WIFE, II.

### DISSOLUTION.

*Of Partnership* — See PARTNERS, III.

### DRAMATIC COPYRIGHT.

See COPYRIGHT.

## ESTOVERS.

### EJECTMENT.

#### I. *Form of Declaration.*

The court refused to grant even a rule nisi for judgment against the casual ejector, where the notice at the foot of the declaration required the tenant to appear "on the first day" of the term, instead of in the term generally. *Doe d. Burton v. Roe.* Page 607

#### II. *Service of Declaration.*

Service of a declaration and notice upon the tenant, by shewing him the same, *off the premises*, and attempting to serve him with a copy, and to explain the same to him, and subsequently leaving a copy with a servant of the tenant on the premises, and explaining it to him:—Held, sufficient. *Doe d. Hope v. Roe.* 770

## ESTATE.

*Sur disseisin*, 51. (a).

## ESTOPPEL.

Whether created by the acceptance of possession from a lessor, or by the acceptance of a demise by indenture, — determined by the cesser or expiration of the estate of the lessor, occurring subsequently to the creation of the estoppel. 224. (c)

See EVIDENCE, V.

ESTOVERS. 51. (k).



## EVICTIION.

### EVICTIION.

See LANDLORD AND TENANT, II.

## EVIDENCE.

### I. *Competency of Witness under 6 & 7 Vict. c. 85.*

In an action by a ship-broker for commission for procuring the execution of a charter, a witness called for the plaintiff, stated, on the *voir dire*, that he had introduced the owner to the broker; that he had nothing to do with the negotiation, and had no claim on the owner; but that he expected, pursuant to arrangement, and to the custom amongst brokers, to receive half the amount of the commission the plaintiff might recover in this action: — Held, that the witness was not a necessary or proper party to be made a co-plaintiff, nor a person “in whose immediate or individual behalf” the action was brought, either wholly or in part, within the proviso in the 6 & 7 *Vict. c. 85.*, and consequently that he was made a competent witness by that statute. *Hill v. Kitching.* Page 299

### II. *Proof of Handwriting.*

To prove that the defendant, “*J. S., of B., woolstapler,*” wrote a letter authorising the secretary of a projected railway company to insert his name in the list of committee-men, a witness was called, who stated that he knew a “*J. S. of B., a woolstapler,*” and that the letter produced, and bearing the *B. post-*

## EVIDENCE. 1013

mark, was his handwriting: the witness further stating that he knew another “*J. S. of B.,*” also a woolstapler—*Semble*, that there was no evidence to go to the jury, to identify *J. S.*, the committec-man, with *J. S.*, the party sued. *Barker v. Stead.* Page 946

### III. *Proof of Notice to a Third Party.*

*B. and C.*, became jointly and severally bound to *A.* as sureties for *D.*, with a condition for the bond to be void, if *B. and C.*, or either of them, should, within one calendar month next after notice given to them of *D.*'s default, pay any balance that might be due from *D.* to *A.*, not exceeding a given sum. In debt by *A.* against the executors of *B.* the issue was, whether or not due notice of *D.*'s default had been given to the defendants and to *C.*: —

Held, that, in order to prove notice to *C.*, it was not enough to produce a duplicate, with proof that the notice had been sent by post, properly addressed, to *C.*; but that *A.* was bound to produce the original notice, or to account for its absence. *Robinson v. Brown.*

754

### IV. *Agreement in Writing.*

In debt for use and occupation, one of the plaintiff's witnesses, on cross-examination, said that he had heard from the plaintiff's attorney, that there was an agreement in writing: Held, that this was no evidence



of the existence of an agreement, so as to render its production by the plaintiff necessary. *Watson v. King.* Page 608

*And see COVENANT.*

#### V. *Recital in Deed.*

*A.*, by a deed, in which it was recited that he was seised in fee, mortgaged to *B.* in fee. Indorsed on this deed was a memorandum, signed by *C.* — “that, by an indenture of surcharge, bearing date, &c., the within premises were charged by me, *the purchaser of the equity of redemption thereof*, with the payment of the further sum of 325*l.* and interest:” —

Held, that this amounted to an admission by *C.* that he came in under *A.*, and that he was therefore bound by the recital that bound *A.* *Doe d. Gaisford v. Stone.* 176

#### EXCEPTION.

*See GRANT.*

#### EXCEPTIONS, BILL OF.

*See PRACTICE, XI.*

#### EXCHEQUER BILLS.

*See BANKER.*

#### EXCUSE.

*Plea in — See BANKRUPT, III. 1.*

#### EXECUTORS.

*See BANKING COMPANY, 3.*

### FOREIGN JUDGMENT.

#### FACTOR.

*See PRINCIPAL AND FACTOR.*

#### FALSE IMPRISONMENT.

*See TRESPASS, I.*

#### FALSE JUDGMENT.

*See COUNTY COURT.*

#### FEME COVERTE.

*See BILLS AND NOTES, III.*  
*HUSBAND AND WIFE.*

#### FIRE.

*See CASE, I. 3. 4.*

#### FORCIBLE ENTRY.

*See ASSIGNEE OF REVERSION, 3.*

### FOREIGN JUDGMENT.

In assumpsit on a judgment or decree of the Tribunal of Commerce at *Brussels*, the defendant pleaded, that *he was not at any time served with any process* issuing out of that court, at the suit of the plaintiffs, for the causes of action upon which the said judgment or decree was obtained, *nor had he at any time notice of any such process*, nor did he appear in the said court to answer the plaintiffs: —

Held, bad, inasmuch as the plea did not show that the proceedings against the defendant in the Belgian court were so conducted as to deprive the defendant of the



## FOREIGN JUDGMENT.

opportunity of defending himself therein. *Reynolds v. Fenton*.

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## FOREIGN LAW.

See PLEADING, III. 2.

FORMEDON, 50 (*m*).

## FRAUDS, STATUTE OF.

See RAILWAY SHARES, 1.

## FRENCH LAW.

See PLEADING, III. 2.

## FRIVOLOUS DEMURRER.

See BILLS AND NOTES, II.

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## GAMING.

See BANKRUPT, II. 2.

## GRANT.

*Construction of.*

1. In trespass for breaking and entering the closes of *A.*, (the plaintiff,) it was pleaded that *B.*, the defendant,) being seised in fee of the closes, and of the manor of *M.*, whereof the closes were parcel, demised the closes to *C.* for ninety-nine years; and that, afterwards, by indenture made between *B.* of the one part, and *C.* of the other part, *C.* granted to the defendant the sole and exclusive

## HABEAS CORPUS. 1015

right to pursue, kill, and take all birds of warren at any time during the term in and upon the closes, together with free liberty to enter the closes, and therein to pursue, kill, and take the birds of warren in and upon the same, at any time, at his free will and pleasure; and so justified entering upon the closes for the purpose of pursuing therein birds of warren. *A.* cravedoyer of the indenture, and demurred to the plea. The indenture appeared to be a demise of the closes by *B.* to *C.*, "except, and always reserved out of that demise unto *B.*, &c., all timber trees, &c., and also except and reserved all *royalties* whatsoever to the premises belonging or in any wise appertaining:" —

*Seemle*, that this clause created an exception or reservation, and was not properly pleadable as a grant. *Pannell v. Mill*. Page 625

But, held, that, at all events, it did not amount to a grant by *C.* of a liberty to *B.* to enter upon the closes for the purpose of pursuing, killing, and taking birds of warren. *Ibid.*

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## HABEAS CORPUS.

To entitle a prisoner to a writ of *habeas* to bring him up to be present on the argument of a rule in which he is interested, he must satisfy the court that substantial



justice cannot be done without his presence. *Clark v. Smith.*

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## HANDWRITING.

*Proof of*— See EVIDENCE, II.

## HULL STOCK EXCHANGE.

*Rules of*— See MONEY PAID, I.

## HUSBAND AND WIFE.

### I. *Plea of Coverture.*

*Costs on.*—Where a married woman obtains a verdict upon a plea of coverture pleaded by her in person, she is entitled to a taxation of her costs out of pocket. *Findley v. Farquharson.* 347

### II. *Execution of Power of Appointment by the Wife during coverture.*

1. *A.* being seised of copyhold lands, in contemplation of her marriage with *B.*, surrendered the same, to the intent that the lord might regrant the same to the use of *A.* until the solemnization of the marriage: and, from and after the marriage, to the use of *B.* for life; and, after his decease, to *A.* and her assigns for life; and, after her decease, to the use of such child and children of the body of *A.* by *B.* to be begotten, and for such estate, &c., charged with any sum or sums for any other of their children, as *A.* should by deed or will limit, devise, or appoint, &c.,

## HUSBAND AND WIFE.

and, in default of appointment, to the use of all the children of the marriage, in equal shares; and, in default or failure of such children, then, from and after the decease of *B.*, to the use of *A.*, her heirs and assigns for ever.

The marriage took place, and two sons having been born, *A.*, by a will, referring to the power, gave, devised, and appointed the premises to her eldest son *C.*, his heirs and assigns for ever, from and after the decease of *B.*, upon condition that he should pay to his brother *D.*, the second son, 200*l.* within one year after the decease of *B.*, or on *D.* attaining the age of twenty-one. The will then proceeded—"but, in case it shall happen that neither of my sons aforesaid shall be living at the decease of *B.*, then I do give, devise, direct, and appoint, the said copyhold messuage, &c., unto *E.* (the father of *B.*), his heirs and assigns," in trust for sale.

Subsequently to the date of the will, there were four other children born of the marriage. *A.* died without altering her will. *C.* and *D.* died before their father, *B.*:—

Held, that the appointment by *A.* was not void by reason of its having been made by her during coverture, notwithstanding the original surrender contained no express dispensation with the disability arising from coverture. *Doed. Blomfield v. Eyre.* Page 557

2. But, held, that the appointment was void, by reason of the subse-



## HUSBAND AND WIFE.

quent limitation to *E.*, the grandfather; for, that the estate or interest given to *C.*, the son, by the former part of the will, was not less subject to be defeated in consequence of the gift over being to a person incapable of taking, than if it had been to a person who was properly an object of the power. *Doe d. Blomfield v. Eyre.* Page 557

### III. Conveyance by Married Woman under 3 & 4 W. 4. c. 74.

1. *Husband a Lunatic.*] — Upon a motion on the part of a married woman, under 3 & 4 W. 4. c. 74. s. 91., to convey her interest in property without the concurrence of her husband, on the ground that he is of unsound mind, the affidavit must show in distinct terms, or by necessary inference, that the husband is lunatic at the time of the application. *In re Jane Turner.* 166
2. *Husband abroad.*] — The court refused, in 1847, to dispense with the concurrence of a husband, under the 3 & 4 W. 4. c. 74. s. 91., upon an affidavit merely stating that he entered a government steamer in *January, 1844.* and that the last the wife had heard of him, was, that, in *January, 1845,* he was on board another government steamer at *New Zealand.* *Ex parte Gilmore.* 967
3. *Form of Conveyance.*] — The court will not sanction a particular form of conveyance by a married woman, under the 3 & 4 W. 4. c. 74. s. 91. *In re Woodall.* 689

## INTERPLEADER. 1017

### IMMATERIAL ISSUES.

See PRACTICE, XII. 1.

### INNOCENDO.

See AMENDMENT, I.

### INSOLVENT DEBTOR.

*Effect of Final Order under 7 & 8 Vict. c. 96. s. 22.*

A final order, under the 7 & 8 Vict. c. 96. s. 22., for the protection of an insolvent from being taken or detained under any process in respect of a debt included in his schedule, cannot be pleaded in bar; such order being a mere *personal* protection, and that statute containing no provision equivalent to the tenth section of the 5 & 6 Vict. c. 116. *Toomer v. Gingell.* Page 322

### INSPECTION OF DOCUMENTS.

See PRACTICE, III.

### INSURANCE.

See LIFE ASSURANCE.

### INTEREST.

See STAMP, II.

### INTERPLEADER.

#### I. Sheriff's Rule.

1. Goods seized by the sheriff under a *fi. fa.* against *A.*, out of the



court of Exchequer, were claimed by *B.*, to whom they were restored upon the establishment of her right upon an issue directed, at the sheriff's instance, under the interpleader act. *B.* afterwards brought *trespass* against the sheriff *for breaking and entering her house*, on the occasion of the seizure:—

This court refused to stay the proceedings—holding the relief and protection afforded to the sheriff by the 1 & 2 *W. 4. c. 58. s. 6.* to be confined to disputed claims to the *goods* seized, or to their proceeds. *Hollier v. Laurie.*

Page 334

2. And, *semble*, that, if the proceeding in this court were a violation of the interpleader order, the application for relief should have been made to the court in which the interpleader took place. *Ibid.*

## II. *Security for Costs.*

The sheriff being in possession of the goods of *B.* under a *fi. fa.* at the suit of *A.*, who was resident in *Scotland*, a *fiat* in bankruptcy issued against *B.*, and his assignees claimed the goods. Upon an application by the sheriff under the interpleader act, a judge at chambers made an order directing an issue, in which the assignees were to be plaintiffs, and *A.*, the execution-creditor, defendant, and ordering that *security for costs should not be required*:—The court amended the order, by striking out these latter words, and directed that *A.* should give secu-

rity for costs. *Williams v. Crossling.*  
Page 957

## IRREGULARITY.

See PRACTICE, VII. VIII.  
RELEASE.

## JOINT CONTRACTORS.

See PRACTICE, VIII. 4, 5.

## JOINT-STOCK COMPANY.

### *Liabilities of Directors and Committee-men.*

1. In 1837 several parties associated together to form a joint-stock company, engaged offices, clerks, &c., and circulated prospectuses containing the name of the defendant as a director. The defendant attended meetings and received summonses, from *October*, 1837, to *March*, 1838, but ceased to attend the one and receive the other after that time, though the company continued to meet till *March*, 1839. On the 31st *July*, 1838, an act passed forming and regulating the company, in which the defendant and several other parties, and all other persons who should take shares, were united into a company. In a deed prepared from instructions given in *November*, 1837, the defendant's name was set forth as a director, and a seal placed on the deed for



his signature; but he never executed the deed.

On the 6th of *November*, 1843, judgment in an action commenced on the 15th *April*, 1840, was signed against the secretary of the company, upon which judgment a *scire facias quare executionem non* issued against the defendant:—

Held, on a special case, under which the court were at liberty to draw such inferences as a jury ought to have drawn, that the foregoing facts did not sufficiently shew that the defendant was a member of the company at the time when the judgment was obtained. *Scott v. Berkeley*.

Page 925

2. One who merely assents to his name being published in a list of a provisional committee of a projected railway company, does not thereby impliedly authorise the secretary, or any one else, to pledge his credit for goods supplied to, or work done for, the company. *Barker v. Stead*. 946

## JUDGMENT.

### I. *Entering*.

The defendant having obtained judgment upon demurrers to two pleas, each going to the whole cause of action, and there remaining issues of fact untried—the court refused to compel the defendant to enter a general judgment of *nil capiat per breve*, in order that the plaintiff might bring a writ of error, without going down to trial upon

the issues of fact. *Hinton v. Acraman*. Page 737

And see PRACTICE, XIII.

### II. *Proof of, on Nul tiel Record*.

In debt on a judgment, the declaration alleged that the plaintiff recovered a judgment against the defendant “in the court of our lady the Queen, of Her Bench here at *Westminster*, in the county of *Middlesex*.” The defendant pleaded “that there was not any record of the said supposed recovery remaining in *the said court* of our lady the Queen, before the Queen Herself at *Westminster* (named in the declaration the court of our lady the Queen of Her Bench at *Westminster*), in manner and form as in the declaration alleged.” The plaintiff replied, “that there was such a record of the said recovery remaining in the said court of our lady the Queen of Her Bench here, in manner and form as the plaintiff had in the said declaration above alleged:”—

Held, that the plaintiff proved the affirmative of the issue, by the production of a record of a judgment recovered in *this court*. *Bradley v. Gray*. 726

### III. *Costs in Action on — See Costs, I.*

### IV. *Nunc pro tunc — See PRACTICE, XIII.*



## LANDLORD AND TENANT.

I. *Notice to Quit.*

1. The only evidence of the terms on which apartments were hired consisted of the following receipt, — “Received of *P. L. C.* one hundred and twenty-six pounds, for rent of furnished house from the 8th of *May* to the 1st of *August* instant” — and a correspondence about the return of the key: — Held, that the jury were warranted in inferring that the hiring was weekly, and not quarterly. *Towne v. Campbell.*

Page 921

2. *Semble, per Coltman, J.*, that, if the hiring had been quarterly, a quarter's notice would have been necessary. *Ibid.*

3. *Quære*, whether in the absence of evidence of a contract or usage requiring notice to quit, a notice is necessary to determine a weekly hiring of furnished apartments. *Ibid.*

4. By a memorandum of agreement, dated the 23rd of *June*, 1842 made between *A.*, as agent for and on behalf of the churchwardens of the parish of *St. M.* (not naming them), of the one part, and *B.* of the other part, it was agreed (provided a licence could be obtained from the lord of the manor, and upon *B.* putting the premises into repair) that the churchwardens should grant a lease to *B.* for twenty-one years from *Midsummer-day* then next, under the clear

yearly rent of 30*l.*; such lease to contain covenants for payment of rent and taxes, and to repair, insure, not to commit waste, &c., and all other usual and proper covenants, &c.; and *B.* agreed to accept such lease, and execute a counterpart, &c., and that, until such lease and counterpart should be granted, the said yearly rent should be payable and recoverable by distress or otherwise, in like manner as if such lease and counterpart had been executed: —

Held, that the tenancy thereby created — whether a tenancy from year to year (which the court thought it was), or a tenancy at will — was properly put an end to by a notice to quit and deliver up possession, given by persons acting as agents for *C.* and *D.*, who were churchwardens at the time the agreement was made and *B.* let into possession; notwithstanding the notice purported also to have been given on behalf of the churchwardens and overseers in office when the notice was served, and did not state *to whom* the possession was to be delivered up. *Doc d. Bailey v. Foster.* Page 215

II. *Eviction.*

In 1841, *B.* agreed to let to *A.* for eight years and a quarter, certain premises, “subject to the same conditions as were mentioned in the memorandum under which *B.* held of *C.*” and it was further agreed, that, “if *C.* was willing to accept *A.* as tenant instead of *B.*,



## LANDLORD AND TENANT.

*A.* was willing to take the remainder of the lease or memorandum from *C.*, and become his tenant."

It appeared that *C.* was tenant to *D.*, and that, *C.*'s term expiring at *Christmas*, 1844, *D.* brought ejectment, and turned *A.* out on the 7th of *February*, 1845.

In an action by *A.* against *B.* for this eviction, the declaration, after setting out the agreement and mutual promises, alleged, that *B.* undertook and promised *A.* that he should and might "quietly use, occupy, and enjoy the premises for the term for which *B.* had so agreed to let them as aforesaid:" —

Held, that no such promise could be implied from the contract set out in the declaration; the contract being subject to conditions the nature of which was not disclosed. *Messent v. Reynolds.*

Page 194

### III. *Quiet Enjoyment.*

*Quære* whether a contract for quiet enjoyment can be implied by law from a mere *agreement to let.* *Messent v. Reynolds.* 194

## LETTERS-PATENT.

### I. *Novelty of Invention.*

Where letters-patent were granted for improvements in apparatus for the manufacture of certain chemical substances, and the jury found that the apparatus was not new, but that the patentee's mode of

## LETTERS PATENT. 1021

connecting the parts of that apparatus was new, the court directed the verdict to be entered for the defendant upon an issue taken upon the novelty of the invention.

*Gamble v. Kurtz.* Page 425

### II. *Who a "true and first Inventor"* *within 21 Jac. 1. c. 3.*

1. A patent granted to a British subject, in his own name, for an invention communicated to him by a foreigner, the subject of a state in amity with this country, is not void, although such patent be in truth taken out, and held by the grantee, in trust for such foreigner. *Beard v. Egerton.* 97

2. In such case, the grantee is the true and first inventor within this realm, within the statute 21 *Jac. 1 c. 3.* *Ibid.*

3. In case for an alleged infringement of a patent so granted, the defendant pleaded, that, by an agreement made in *France*, between the original inventor and the King of the French, the former, for the considerations therein mentioned, assigned the invention to the French government, and that, by virtue of that agreement, and by the laws of *France*, the invention became vested in the King of the French in right of his crown, who thereby became entitled, by the laws of *France*, to vend and publish the invention, as well in that country as in *Great Britain and Ireland*, and in any other country or place where he should think fit, without



## LIBEL.

such a plea ; and that a replication which admitted that the libel was inserted in a newspaper, and the payment of money into court, and traversed the insertion of the libel without actual malice, and without gross negligence, and the sufficiency of the money paid into court as amends, was good. *Chadwick v. Herapath.* Page 885

## LIEN.

See **BANKER.**

**PRINCIPAL AND FACTOR, 3.**

## LIFE ASSURANCE.

### *Death by Suicide.*

*A.* effected a policy on his own life, subject, amongst others, to the following conditions : — that the policy should become void, if the assured should die on the high seas, or should go beyond the limits of *Europe*, or enter the military or naval service, except with the permission of the assurers — and [that “every policy effected by a person on his or her own life should be void, if such person should *commit suicide*, or die by duelling or the hands of justice.”

*A.* died in consequence of having voluntarily, and for the purpose of killing himself, taken sulphuric acid, but under circumstances tending to show that he was at the time of unsound mind.

In an action by the administratrix of *A.* upon the policy, the defendants pleaded that *A. did com-*

## LOCAL COURT. 1023

*mit suicide*, whereby the policy became void ; and at the trial the judge directed the jury, “that, in order to find the issue for the defendants, it was necessary that they, the jury, should be satisfied that *A.* died by his own voluntary act, *being then able to distinguish between right and wrong, and to appreciate the nature and quality of the act that he was doing, so as to be a responsible moral agent* ; that the burden of proof, as to his dying by his own voluntary act, was on the defendants ; but, that being established, the jury must assume that he was of sane mind, and a responsible moral agent, unless the contrary should appear in evidence : ” —

Held, upon a bill of exceptions, that this direction was erroneous ; for, that the terms of the condition included all acts of voluntary self-destruction, and, therefore, that, if *A.* voluntarily killed himself, it was immaterial whether he was or was not at the time a responsible moral agent — *dissentientibus Pollock, C. B., and Wightman, J. Clift v. Schwabe.* Page 437

## LIVERPOOL GAS COMPANY.

See **CASE, I.**

## LOCAL COURT.

See **COUNTY COURT.**

**COURT OF REQUESTS.**

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## NON ASSUMPSIT.

See PLEADING, I. 1.

## NOTICE.

I. *Of Action.*

By a railway act it was enacted, that no action should be brought for anything done or omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by the act, unless twenty days' previous notice in writing should be given. The company having, contrary to the provisions of the act, made excessive charges for the carriage of goods, and claimed and received the amount of such charges from the plaintiff:—Held, that, in an action for money had and received, brought to recover back the sums so extorted, the company were entitled to a notice of action. *Kent v. Great-Western-Railway Company.* Page 714

II. *Of Trial*—See PRACTICE, X.III. *Of Proceedings in Foreign Court*—See FOREIGN JUDGMENT.IV. *To quit*—See LANDLORD AND TENANT, I.

## NUL TIEL RECORD.

See JUDGMENT, II.

## NUNC PRO TUNC.

See PRACTICE, XIII.

## ORDER OF REFERENCE.

See ARBITRAMENT, I.

## PANTOMIME.

See COPYRIGHT.

## PARISH LANDS.

The statute 59 G.3. c. 12. s. 17., does not apply to copyholds. *Doe d. Bailey v. Foster.* Page 215

## PARLIAMENT.

*Action against Returning Officer for refusing Vote.*

1. In case against a returning officer, for refusing to admit the plaintiff's vote at an election of a borough member, the first count—after stating the writ and precept for the election—alleged that the plaintiff was a burgess, that his name was on the register of voters, that he tendered his vote for one of the candidates, and answered in the affirmative the questions authorized by the 6 & 7 Vict. c. 18. s. 81. to be put by the returning officer, and was ready and offered to take the oath prescribed by s. 82.; but that the defendant, being returning officer, *wrongfully, fraudulently, and wilfully intending to injure the plaintiff,* and to hinder and disappoint him of his privilege of and in the premises, refused to permit the plain-



tiff to give his vote, or allow the same to be entered and recorded, and a burgess was elected, the plaintiff being so excluded from giving his vote. To this count, the defendant pleaded that the plaintiff was not a burgess of the borough duly *qualified* or *entitled* to vote in or at the election therein mentioned:—Held, that the plea was bad for ambiguity. *Pryce v. Belcher.* Page 58

2. The second count—after stating the writ and precept, and that the plaintiff was a burgess, and on the register—proceeded to allege that he tendered his vote for one of the candidates; that it was the duty of the defendant, so being such returning officer, to allow such vote to be entered and recorded and cast up in the poll-books; that he was requested so to do; but that he, contriving and *wrongfully and fraudulently and wilfully and maliciously intending to injure and damnify the plaintiff*, and to hinder and disappoint and deprive him of the benefit of his right and privilege aforesaid, instead of entering and recording the plaintiff's vote in the poll-books, to the end and intent aforesaid, refused so to receive the same, or to admit and allow the same to be entered and recorded to the end and intent aforesaid; but, on the contrary thereof, caused the vote of the plaintiff to be entered in the column of *votes tendered* in the poll-books, and at the close of

the poll refused to reckon, include, and cast up, and did not reckon, &c., the plaintiff's vote among the votes given for that candidate; *whereby* the plaintiff was deprived of the benefit of his right to vote at that election:—*Semble*, that the count disclosed a *prima facie* cause of action. *Pryce v. Belcher.* Page 58

3. The third count—after stating the writ and precept, that the plaintiff was a burgess and on the register, and that he tendered his vote—alleged that it was the duty of the defendant, as returning officer, to enter the vote on the poll-books without entering into or allowing a scrutiny; but that the defendant, knowing the premises, but contriving and *wrongfully, fraudulently, wilfully, and maliciously intending to injure and damnify the plaintiff*, and to delay him in the exercise of his privilege of voting, and deprive him of the benefit of his said privilege, *wrongfully* ordered and allowed a scrutiny to be held with regard to the plaintiff's vote, and his right and qualification to vote, and *wrongfully* took upon himself to adjudge and determine, at and after such scrutiny so ordered and allowed, that the plaintiff was not entitled to give, and had no qualification enabling him to give, his vote at that election; *whereby* the plaintiff was delayed, hindered, and obstructed in the exercise of his said privilege of voting, and a burgess was elected for that par-



liament, the plaintiff's vote being so hindered and obstructed, &c.:

—Held, that this count also disclosed a *prima facie* cause of action—inasmuch as it was possible that the delay arising from the holding of a scrutiny (which is prohibited by the 6 & 7 *Vict. c. 18. s. 82.*) might have had the effect of preventing the plaintiff from exercising his right of voting; and, if so, that the action would be maintainable, the act of the defendant being wrongful, and having caused a particular damage to the plaintiff. *Pryce v. Belcher.* Page 58

4. Held also that the words subsequent to the *per quod* amounted to an averment of matter of fact, and were not mere matter of legal inference from the preceding allegations. *Ibid.*

## PARTICULARS.

*Of Demand* — See PRACTICE, II.

## PARTNERS.

### I. *What constitutes a Partnership.*

1. One who takes a share of the *profits*, as such, of a trading concern, thereby becomes a partner as to third persons, on the ground of those profits forming a portion of the fund upon which creditors have a right to rely for payment.

*Pott v. Eyton.* 32

2. Yet the receipt of a per-centage upon the gross amount of sales made to certain customers, by the person who recommended such customers, does not constitute him

a partner as against third persons. *Pott v. Eyton.* Page 32

3. *A.*, who was concerned in a colliery, in the year 1830, built and stocked a general shop in its neighbourhood, for the purpose of supplying goods to the workpeople, placing *B.* there to conduct the business; *A.* receiving for his own use 7 *per cent.* upon the amount of the gross sales made to the miners; and *B.* taking all the rest of the profits of the concern, from whatever source derived. *A.*'s name appeared over the shop-door, and in the excise licences; and, down to the year 1834, all the goods supplied to the shop were purchased and paid for by or in the name of *A.* In that year, it was agreed between *A.* and *B.*, that the latter should thenceforward buy all goods that were required for the shop, and that the former should receive only 5 *per cent.* upon the amount of sales to the miners. After this new arrangement had been come to, *B.*, who had several other shops, opened an account with a bank at *Holywell*, and, on the failure of the bank in 1839, there was a balance due to the bankers on that account exceeding 2000*l.* There was no evidence to show that credit was in fact given to *A.* by the bank, or that they were aware that his name had been placed over the shop door, or that they supposed him to be a partner at the time the debt was contracted.

In an action by the assignees of



the bankers against *A.* and *B.*, to recover the balance, the jury having negatived the existence of an actual partnership between *A.* and *B.*, or that *A.* had, with his own permission, been held out as a partner, the court refused to disturb the verdict. *Pott v. Eylon.*

Page 32

4. *A.*, the proprietor of a newspaper, agreed to sell all the plant of the office to *B.* for 1500*l.*, to be paid, with interest, by instalments running over a period of seven years, *A.* undertaking to guarantee to *B.* during the seven years the clear yearly profit of 150*l.* over and above the annual payments of principal and interest: and *B.*, in consideration of such guarantee, agreed to pay all such surplus profits to *A.* until such surplus profits should amount to 500*l.*, if they should amount to that sum during the seven years; and that, if such surplus profits should, during the seven years, amount to 500*l.*, then *B.* should pay, — over and above the purchase-money and interest, and the 500*l.*, — the existing liabilities of the newspaper, not exceeding 250*l.* : —

Held, that *A.* was liable, as a (*quasi*) partner, for the price of goods supplied to *B.*'s order for the use of the newspaper. *Barry v. Nesham.* 641

## II. Authority of Partner.

1. One partner has no implied authority to consent to an order for a judgment in an action against

himself and his co-partner. *Hambridge v. De la Crouée.* Page 742

2. In an action against *A. B.* and *C. D.* upon a promissory note signed by *A. B.* in the names of himself and *C. D.*, it appeared that the business in respect of which the note was given, had formerly been carried on by *C. D.*, and that *C. D.* had admitted that she was a partner : — Held, that a circular issued by *A. B.*, stating that "the business would in future be carried on in the name of *B.* and *D.*," was admissible in evidence, though not distinctly brought home to *C. D.* *Norton v. Seymour.* 792

3. Held also, that a signature of the note by the names and surnames of the respective parties, was a sufficient signature to charge the partnership. *Ibid.*

4. *Quære*, whether, in the absence of a special authority, one partner can bind another by a signature other than that of the usual style of the firm. *Ibid.*

## III. Notice of Dissolution.

*A.*, *B.*, *C.*, and *D.*, who carried on business under the firm of *G., P., & Co.*, in 1840 opened an account with a banking company established under the 7 *G. 4. c. 46.*, 1 & 2 *Vict. c. 96.*, and 5 & 6 *Vict. c. 85.* In 1842, *A.* retired from the firm, but this fact was not advertised in the *London Gazette*, nor was any alteration made in the pass-book : —

Held, that the mere fact of *D.*,



one of the firm of *G., P., & Co.*, being also a *director* of the banking company (but having as such no share in the management of or interference in the banking accounts), did not amount to notice, — actual or constructive, — to the bank, of the dissolution, so as to discharge *A.* in respect of a debt subsequently accruing; a banking company so established, differing in this respect from an ordinary trading partnership. *Powles v. Page.* Page 16

## PATENT.

See LETTERS-PATENT.

## PAUPER.

*Plea of Release by.*

1. A pauper plaintiff having, behind the back of his attorney, and under circumstances showing a desire on his part to deprive him of his costs, agreed with the defendants, in an action for unliquidated damages, to execute a release, and the defendants having pleaded such release *puis darrein continuance* — the court, at the instance of the attorney, set it aside. *Wright v. Burroughes.* 344
2. The plea was delivered on the 22nd of *April*: the motion to set it aside was not made until the 8th of *June*: — Held, not too late, it not being a mere irregularity. *Ibid.*

## PAYMENT.

See CONTRACT, 1.

## PENALTY.

See ARBITRAMENT, II. 1.

## PERFORMANCE.

*Plea of* — See BANKRUPT, III. 1.

## PLEADING.

## I. ASSUMPSIT.

1. *Plea amounting to Non Assumpsit.*

To a count upon a contract by the defendant to receive a certain quantity of wool from the plaintiffs at a certain price, the defendant pleaded, that, at the time of making the contract, the plaintiffs produced a sample, and promised the defendant that the bulk was equal in quality and description thereto, but that the wool when tendered was found to be of inferior quality, wherefore the defendant refused to accept it: —

Held, that the plea was not bad, on special demurrer, as amounting to non assumpsit, inasmuch as the contract therein set up was not necessarily incompatible with the contract declared on. *Sieveling v. Dutton.* Page 381

2. *Non-joinder of Co-contractor.*

A plea in abatement, for the non-joinder of a co-contractor, which prays judgment of the *declaration* only, is informal; it ought to pray judgment of the *writ and declaration*. *Whitting v. Des Anges.* 910



## II. CASE.

1. *What admissible under "Not guilty"* — See CASE, I. 2.
2. *For Libel* — See LIBEL.
3. *For Malicious Arrest* — See CASE, II.
4. *For Negligence* — See CASE, I.

## III. DEBT.

1. *Accord and Satisfaction.*

*Special Replication, shewing the Nullity of.*] — In debt for money had and received, &c., the defendant pleaded, that, after the accruing of the debts and causes of action, the defendant executed a deed, securing to the plaintiff a certain annuity, and that the plaintiff then accepted and received the same of and from the defendant in full satisfaction and discharge of all the said several debts and causes of action.

The plaintiff replied, that no memorial of the annuity deed was inrolled pursuant to the statute; that, the annuity being in arrear, the plaintiff brought an action to recover the amount of the arrears; that the defendant pleaded in bar of that action the non-inrolment of the memorial; and that thereupon the plaintiff elected and agreed that the indenture should be null and void, as pleaded by the defendant, and discontinued the action: —

Held, a good answer to the plea, inasmuch as it shewed that the accord and satisfaction thereby

set up had been rendered nugatory and unavailing by the act of the defendant himself. *Turner v. Browne.* Page 157

2. *Foreign Law.*

1. To debt on bond the defendant pleaded — that the bond was executed by him in *France*, where he was then domiciled; that it was not taken or passed by any public officer authorized by the laws of that kingdom, nor was it written throughout by the hand of the defendant; that, though the defendant signed the bond with his own hand, he did not write thereon with his proper hand the formula styled in the French tongue a "*bon*," or "*approuvé*," bearing in words at length the sum secured, nor was the defendant at the time a merchant or tradesman, &c.; concluding that, "by reason of the premises the bond, by the laws of *France*, never was nor is obligatory or binding on the defendant, but always was and is of no force, effect, or validity:" —

Held, that the plea was bad, as being a mere argumentative and inferential statement of the *French* law; which, being pleadable only as matter of fact, ought to have been distinctly and affirmatively alleged. *Benham v. The Earl of Mornington.* 133

2. *Quære*, whether, supposing it to have been well pleaded, the whole of the allegations therein might have been put in issue by



*de injuriâ?* *Benham v. The Earl of Mornington.* Page 133

IV. QUARE IMPEDIT.

*Rules of Hilary, 4 W. 4.*

Inapplicable to *quare impedit* —  
*Tolson v. The Bishop of Carlisle,*  
41

V. TRESPASS.

*Justification on Suspicion of Felony.*  
See TRESPASS, III.

VI. TROVER.

*Former Recovery* — See TROVER.

VII. PARTICULAR POINTS.

1. *Accord and Satisfaction* — *Antè,*  
III. 1.

2. *Allegation of Fraud* — See PAR-  
LIAMENT, 1, 2, 3.

3. *Ambiguity* — See PARLIAMENT, 1.

4. *Colour* — See ASSIGNEE OF  
REVERSION, 3.

5. *Conclusion of Law* — See PAR-  
LIAMENT, 4.

6. *Coverture* — See BILLS AND  
NOTES, III.

7. *De Injuriâ* — *Antè,* III. 2.

8. *Departure* — See ASSIGNEE OF  
REVERSION, 3.

9. *Felony, Suspicion of* — See TRES-  
PASS, III.

10. *Foreign Law* — *Antè,* III. 2.

11. *Former Recovery* — See TROVER.

12. *Fraud, Allegation of* — See  
PARLIAMENT, 1, 2, 3.

13. *Frivolous Demurrer* — See  
BILLS AND NOTES, II.  
PRACTICE, V.

14. *Libel* — See LIBEL.

15. *Malicious Arrest* — See CASE, II.

16. *Negligence* — See CASE, I.

17. *Non Assumpsit* — *Antè,* I. 1.

18. *Non-joinder of Co-contractor* —  
*Antè,* I. 2.

19. *Not guilty in Case* — See CASE,  
I. 2.

20. *Performance or Excuse* — See  
BANKRUPT, III. 1.

21. *Release puis darrein Continu-  
ance* — See RELEASE.

22. *Repleader* — See PRACTICE,  
XII. 1.

POSTEA.

See PRACTICE, XIII.

PRACTICE.

I. Process.

*Writ of Summons.*] — A writ of  
summons describing a public com-  
pany, as “now or late carrying  
on business in *King-William Street*,  
in the city of *London*,” was served  
upon a director at *Barnet*, in *Mid-  
dlesex*: — Held, that both writ and  
service were irregular. *Pilbrow  
v. Pilbrow's-Atmospheric Railway  
Company.* Page 730

And see 16 M. & W. 438.



## II. *Particulars of Demand.*

*Waiver of.*]—A defendant, who has obtained an order for particulars of the plaintiff's demand, with a stay of proceedings until they are delivered, may waive the delivery of such particulars, and plead or demur to the declaration. *Maunder v. Collett.* Page 554

## III. *Inspection of Documents.*

In an action by the secretary against a provisional-committee-man of a projected railway company, for arrears of salary, a judge at chambers ordered that the defendant, should be at liberty to inspect, and take copies from, the minute-book of the company, containing resolutions of the managing committee, referred to in the plaintiff's particular of demand, as the foundation of his claim. The court refused to rescind the order, the plaintiff not satisfactorily shewing that it was not in his power to comply with it. *Shaw v. Holmes.* 952

## IV. *Rule to compute.*

1. *Seemle*, that it is not necessary, upon a rule to compute, to produce the bill or note before the master. *Davis v. Barker.* 606
2. At all events, a variance between the name of the defendant on the record and that in the bill or note, will not justify the master in declining to proceed on the rule. *Ibid.*

## V. *Frivolous Demurrer.*

The plaintiff in the first count, declared on a bill of exchange drawn and indorsed to him by the defendant, and in the second for money alleged to be due from the defendant upon an account stated—concluding, that, “in consideration of the premises respectively, the defendant promised to pay *the said several last-mentioned moneys* respectively to the plaintiff, on request.”

The defendant demurred to the second count, on the ground that it contained an incorrect statement of the consideration for the promise; or, if “the last-mentioned moneys” included the money in the first count, then the second count was bad for duplicity. The court set aside the demurrer as frivolous. *Lomax v. Wilson.* Page 763

*And see* **BILLS AND NOTES, II.**

## VI. *Right to begin, 76. n.*

## VII. *Time for moving for Irregularity.*

*See* **BANKING COMPANY.  
RELEASE.**

## VIII. *Setting aside and staying Proceedings.*

1. On the 11th of November, the defendant was served with a writ of summons, indorsed for 6*l.* 5*s.* debt, costs 1*l.* 15*s.* On the 4th of December, the plaintiff delivered a declaration, and on 14th full particulars



of demand. On the 19th, the defendant took out a summons to stay proceedings, on payment of 18s., without costs, swearing that no more was due, and that he was liable to be summoned to a court of requests; but, the plaintiff claiming more, no order was made. On the 24th the defendant pleaded, except as to 18s. *nunquam indebitatus* and payment, and, as to 18s., payment into court. On the 9th of *January*, the plaintiff took the money out of court, and entered a *nolle prosequi* as to the rest. On the 20th of *January*, the plaintiff caused his costs to be taxed by the master:—

Held, that the plaintiff was entitled to no costs; and that the defendant was entitled to his costs incurred subsequently to the 19th of *December*. *Fletcher v. Tanner*.

Page 963

2. And held, that the defendant was not too late in applying to the court on the 21st of *January*, to set aside the allocatur. *Ibid.*

3. A declaration omitting to state whether the plaintiff sues in person or by attorney, is irregular; but the application to set it aside should be made at chambers. *White v. Feltham*. 658

4. The plaintiffs having brought eleven actions, against as many directors of a railway company, for the recovery of the same demand—the court refused to stay proceedings in all the actions but one. *Giles v. Tooth*. 665

5. Two separate actions having been

brought against two *joint-contractors*, in respect of the same demand, and the debt and costs in one action having been paid, a judge at chambers made an order staying the proceedings in the other action, *without costs*:—The court refused to rescind or vary the order. *Newton v. Blunt*.

Page 675

6. *Under 4 & 5 Ann. c. 16. s. 13.*]—The court will not interfere, under the statute 4 & 5 *Ann. c. 16. s. 13.*, to stay proceedings in an action upon a bond, where it is at all doubtful that the payment stipulated by the condition, is not subject to a contingency. *Robinson v. Brown*. 54

#### IX. *Term's Notice of proceeding.*

1. Where a rule has been made absolute to set aside a verdict found for the defendant, and for a new trial, on payment of costs by the plaintiff, and the plaintiff for more than a year fails to pay the costs, or to take any steps towards availing himself of the rule, the defendant cannot move to discharge it, without previously giving a term's notice of his intention so to do. *Lord v. Wardle*. 295

2. An objection that such a notice has been given in the name of an attorney, other than the attorney upon the record, must be most distinctly pointed out. An affidavit by the plaintiff and his present attorney, (his attorney on the record being dead, and the rule having been made more than nine



years ago,) stating "that they had not, nor had either of them, ever been served with any order to change the attorney, nor had they, or either of them, ever had any notice or intimation that any other party had been appointed attorney for the defendant, in the place or stead of the attorney upon the record," was held to be insufficient. *Lord v. Wardle*.

Page 295

3. The rule as to a term's notice of proceeding, where no step has been taken for more than four terms, does not apply to a proceeding after verdict. *Newton v. Boodle*. 795

#### X. Notice of Trial.

A defendant is not bound to return an irregular notice of trial, though made aware by a notice to produce, that the plaintiff is proceeding thereon. *Wood v. Harding*.

968

#### XI. Bill of Exceptions.

When exceptions are taken to the direction of a judge, it is not enough to state in the bill of exceptions that he declined to direct the jury in the way suggested, without showing what his direction was. *M'Alpine v. Mangnall*.

496

#### XII. Assessment of Damages.

1. A declaration for a conspiracy to prevent the plaintiff's being employed as an actor, stated, by way of inducement, that the plaintiff was about to exercise the profes-

sion of an actor for emolument, and that he did become an actor, and used and exercised that profession; and then alleged the conspiracy of the defendants, and its results. The defendants pleaded, first, not guilty, then two pleas denying these matters of inducement, and a fourth, stating special matter, which was demurred to. The demurrer was determined by the court in favour of the plaintiff. A *venire* was awarded, to try the issues and to assess damages. The jury found the issues of fact for the defendants, but assessed no damages in respect of the confession of a cause of action contained in the fourth plea. Judgment was given for the defendants, with costs of suit, but without an award of costs of the demurrer: —

Held, that, a verdict having been found for the defendants upon an issue that went to the whole cause of action on the merits, the want of an assessment of *damages* was not error; and, for the same reason, that a repleader was unnecessary, though (*come semble*) the issues joined on the second and third pleas were immaterial. —

*Gregory v. The Duke of Brunswick*.

Page 481

2. Held also, that the judgment was erroneous, in not awarding *costs* of the demurrer, pursuant to the 3 & 4 W. 4. c. 42. s. 34. *Ibid.*
3. But, held, that, upon this writ of error brought *by the plaintiff*, the court could not simply reverse the



judgment of the court below, but must give such judgment as that court ought to have given, viz. a judgment for the plaintiff on the demurrer, with costs, and for the defendants on the issues found for them. *Gregory v. The Duke of Brunswick.* Page 481

### XIII. Entering Judgment Nunc pro Tunc.

1. Judgment can only be entered up *nunc pro tunc* where the delay has arisen from the act of the court. *Fishmongers' Company v. Robertson.* 970
2. *A.* obtained judgment against *B.*, *C.*, and *D.*, upon demurrer to certain pleas severally pleaded by them. Upon the trial of the issues in fact, at the sittings after *Michaelmas* term, 1845, a verdict was found for *B.* and *C.* upon the pleas of non assumpsit by them respectively pleaded, subject to a bill of exceptions, and the jury were discharged as to the other issues. The bill of exceptions was not settled and sealed until the 27th of *May*, 1846, and consequently the *postea* remained in the hands of the associate until shortly after that time. Negotiations were pending between *B.* and *A.* as to the form in which the judgment should be entered for himself (*B.*) and *C.* until the 22nd of *August*, and, before the form was finally settled between *B.* and *C.*, *B.* died.

The court refused, at the instance of the executors of *B.*, to allow judgment to be entered up for him

*nunc pro tunc.* *Fishmongers' Company v. Robertson.* Page 970

### PRESENTMENT.

See **BILLS AND NOTES, I.**

### PRINCIPAL AND FACTOR.

#### *Authority of Factor.*

1. *In general.*] — The mere relation of principal and factor confers, ordinarily, an authority to sell at such times and for such prices as the factor may, in the exercise of his discretion, think best for his employer; but, if he receive the goods subject to any special instructions, he is bound to obey them. *Smart v. Sandars.* 380
2. *Revocation of.*] — The authority, whether general or special, is revocable. *Ibid.*

*Quære*, whether the factor's authority to sell can be revoked after he has made advances upon the credit of the goods consigned to him? *Ibid.*

3. *Sale for Repayment of Advances.*] In assumpsit, the declaration stated that the plaintiffs had consigned wheat to the defendants, who were corn-factors, for sale on account of the plaintiffs; that the defendants then promised the plaintiffs to obey and observe the lawful orders and directions of the plaintiffs to be given by them to the defendants in regard to the sale and disposal of the wheat, and that, although the plaintiffs ordered the defendants not to sell below a certain price, and al-



though the same was a lawful order and direction in that behalf, yet the defendants, not regarding their promise, sold at a less price.

Plea, that, after the delivery of the wheat to the defendants, they became and were under advances to the plaintiffs in respect thereof; that they gave the plaintiffs notice that they required to be repaid such advances, and that, in default, they should sell the wheat and repay themselves; and that, although a reasonable time had elapsed, the plaintiffs did not repay them such advances; whereupon the defendants, for the purpose of reimbursing themselves, sold the wheat for the best prices that could then be obtained for the same, &c.: —

Held, that the plea was bad in substance, there being nothing in the transaction disclosed upon the the record, from which it could be inferred that it was part of the contract that at any time the wheat should be forfeited, or the defendants' authority to sell enlarged, so as to enable them to sell for repayment of advances, without reference to its being for the interests of the principals to sell at that particular time, and for that price. *Smart v. Sanders.*

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### PRISONER.

*Charging in Execution.*

It is no ground of objection to a defendant's being charged in ex-

### QUIET ENJOYMENT.

ecution, that the plaintiff had on a former occasion repudiated the action. *Revell v. Wetherell.*

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*And see HABEAS CORPUS.*

### PROBABLE CAUSE.

*See CASE, II.*

### PROFITS.

*See PARTNERS, I. 4.*

### PROVISIONAL COMMITTEE.

*See JOINT STOCK COMPANY.*

### QUALIFICATION OF VOTER.

*See PARLIAMENT.*

### QUARE IMPEDIT.

*Pleadings in.*

1. The rules of *Hilary* term, 4 *W. 4.* do not apply to actions of *quare impedit*. *Tolson v. The Bishop of Carlisle.* 41
2. In *quare impedit*, the declaration contained six counts, all founded upon the same title, but taking it up from different periods: — The court refused to put the plaintiff to his election upon which of the counts he would rely. *Ibid.*

### QUIET ENJOYMENT.

*See LANDLORD AND TENANT, III.*



## RAILWAY COMPANY.

### RAILWAY COMPANY.

See CASE, I. 3, 4. ?

JOINT STOCK COMPANY.

### RAILWAY SHARES.

*Contract for.*

1. *Not within the Statute of Frauds.]*  
A contract for the sale of "shares" in a projected railway, is not a sale of goods within the statute of frauds. *Tempest v. Kilner*, 249; *Bowlby v. Bell*. Page 284
2. *How satisfied.]*—Such a contract is satisfied by a tender of a "letter of allotment," where from the circumstances it may be inferred that the parties dealt upon the footing of such document being equivalent to scrip: and, consequently, there may be a complete breach of such a contract before the actual existence of any "scrip" or "shares" properly so called. *Tempest v. Kilner*. 249
3. *Measure of Damages for Breach of.]*—Held, that the vendee of shares in a projected railway, under a contract to be completed at a future day, may recover, as damages for the non-delivery, the difference between the price agreed on, and the market-price of the day on which the sale should have been completed; but that he is not entitled to damages in respect of a further advance of price taking place afterwards at the time of the actual issuing of the scrip. *Tempest v. Kilner*. 253  
*And see MONEY PAID, 1.*

## REWARD.

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### REFERENCE.

See ARBITRAMENT.

### RELEASE.

*Quære*, whether it is competent to a defendant to plead a release, *puis darrein continuance*, after a demurrer to his rejoinder to a replication to one of several pleas, originally pleaded to the action. *Wright v. Burroughes*. Page 344  
*And see ANNUITY, II.*

PAUPER.

RENT-CHARGE, 51. (*k*).

RENT-SERVICE, 51. (*k*).

### REPLEADER.

See PRACTICE, XII. 1.

### REPLEVIN.

See COUNTY COURT.

### RESERVATION.

See GRANT.

### REVERSION.

*Assignee of*— See ASSIGNEE OF REVERSION.

### REWARD.

*For Apprehension and Conviction of a Felon.*

The defendant, who had been robbed of jewellery, published an adver-



tisement, headed "30*l.* reward," describing the articles stolen, and concluding thus:—"The above sum will be paid by the adjutant of the 41st regiment, *on recovery of the property, and conviction of the offender*, or in proportion to the amount recovered."

*A.*, a soldier, on the 10th of *June*, informed his serjeant that *B.* had admitted to him that he was the party who had committed the robbery, and the serjeant gave information at the police-station. On the 14th, the plaintiff, a police-constable, learning from one *C.* that *B.* was to be met with at a certain place, went there and apprehended him. The plaintiff, by his activity and perseverance, afterwards succeeded in tracing and recovering nearly the whole of the property, and in procuring evidence to convict *B.* : —

Held, that the plaintiff was not, but (per *Tindal*, C. J., and *Cresswell*, J.) that *A.* was, the party entitled to the reward. *Thatcher v. England.* Page 254

## ROYALTY.

See GRANT.

## RULE TO COMPUTE.

See PRACTICE, IV.

## SHIP BROKER.

## SALE.

- I. *By Factor* — See PRINCIPAL AND FACTOR, 3.
- II. *Title* — See VENDOR AND PURCHASER.

## SATISFACTION.

*Replication to Plea of*, 165. n.

## SCIRE FACIAS.

See BANKING COMPANY.

## SCRIP.

See RAILWAY SHARES.

## SCRUTINY.

See PARLIAMENT, 3.

## SECURITY FOR COSTS.

See INTERPLEADER, II.

## SHERIFF.

*Bailiffs' Fees.*

The attorney who engages the service of the bailiff, and not the client, is the party liable to the bailiff for the fees usually allowed on taxation for the execution of process. *Walbank v. Quarterman* Page 91

And see INTERPLEADER, II.

## SHIP-BROKER.

*Commission.*

- I. The actual earning of freight under a charter-party, is not a condition precedent to the right of the ship-broker to his commis-



## SHIP-BROKER.

sion for procuring the execution of the charter. *Hill v. Kitching*.

Page 299

2. *A.*, a ship-broker, procured a charter-party to be made between *B.*, a ship-owner, and *C.*, under which the owner contracted to bring home a cargo of guano, and the merchant agreed to pay freight at the rate of 4*l.* 15*s.* per ton, to be reduced to 4*l.* 12*s.* 6*d.* if the ship did not arrive off *Cork* or *Falmouth* on or before a given day. There was no express engagement on the part of *C.* to ship a cargo:—Held, that *A.* was entitled to recover from *B.*, upon a *quantum meruit*, for his work and labour in procuring the charter to be executed, without shewing the arrival of the vessel on or before the day mentioned, and notwithstanding only a very small quantity of guano had been shipped, and a small amount of freight actually earned; that the amount of compensation due to him was a question for the jury; and that, in estimating such compensation, they were properly guided by evidence of what was customary in similar cases. *Ibid.*

## SLANDER OF TITLE.

In case against a surveyor of highways, appointed under the 7 & 8 *Vict. c. 84.*, for words spoken by him with reference to certain unfinished houses put up for sale by public auction, — malice is not to

## STAMP.

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be inferred from the circumstance of the defendant having acted upon an incorrect view of his duty, founded upon an erroneous construction of the statute. *Pater v. Baker*. Page 881

## STAMP.

### I. On Agreement.

By a memorandum of agreement, dated the 23rd of June, 1842, made between *A.*, as agent for and on behalf of the churchwardens of the parish of *St. M.* (not naming them), of the one part, and *B.* of the other part, it was agreed (provided a licence could be obtained from the lord of the manor, and upon *B.* putting the premises into repair,) that the churchwardens should grant a lease to *B.* for twenty-one years from *Midsummer-day* then next, under the clear yearly rent of 30*l.*; such lease to contain covenants for payment of rent and taxes, and to repair, insure, not to commit waste, &c., and all other usual and proper covenants, &c.; and *B.* agreed to accept such lease, and execute a counterpart, &c., and that, until such lease and counterpart should be granted, the said yearly rent should be payable and recoverable by distress or otherwise, in like manner as if such lease and counterpart had been executed:—Held, that this instrument was properly stamped as an agreement. *Doe d. Bailey v. Foster*. 215



II. *On Mortgage.*

*By-gone Interest.*] — By indenture dated the 17th of *November*, 1845, reciting that *A.* was indebted to *B.* in 100*l.*, *A.* assigned to *B.* all and every the goods, fixtures, tools, &c., which then were, or at any time during the continuance of that security should be, in and upon certain premises, to have, receive, and take the said goods, &c., thereby assigned, *as per schedule*, unto *B.*, &c. The deed contained a covenant by *A.* for payment of the 100*l.* on the 8th of *February*, 1846, with interest thereon from the 8th of *August* preceding: — Held, that a mortgage-stamp on the deed, applicable to a sum not exceeding 100*l.* was sufficient. *Daines v. Heath.* Page 938

## STATUTE OF FRAUDS.

*Interest in Land.*

The plaintiff agreed to let a house to the defendant, and to sell him certain furniture and fixtures therein, and to make certain alterations and improvements in the house; and the defendant agreed to take the house, and to pay for the furniture and fixtures and alterations: — Held, that this was an agreement relating to an interest in land, within the fourth section of the statute of frauds. *Vaughan v. Hancock.* 766

*And see RAILWAY SHARES.*

## TITHES.

## SUICIDE.

*See LIFE ASSURANCE.*

## SUMMONS.

The court cannot take notice of a consent to a summons, unless followed in due time by an order drawn up and served. *Wood v. Harding.* Page 968

## SURETY.

*See ANNUITY, II.*

## TENANCY FROM YEAR TO YEAR.

*See LANDLORD AND TENANT, 4.*

## TENANCY AT WILL.

*See LANDLORD AND TENANT, 4.*

## TENDER.

*See MONEY PAID.*

## TERM'S NOTICE.

*See PRACTICE, IX.*

## THEATRICAL ENTERTAINMENT.

*See COPYRIGHT.*

## TITHES.

*Appeal under 6 & 7 W. 4. c. 71. s. 46.*

1. To entitle a landholder to bring



an action by way of appeal against a decision of an assistant-tithe-commissioner, under the 6 & 7 W. 4. c. 71., directing tithes to be paid in kind, the yearly value of the payment to be made *by him* thereunder must exceed 20*l.* *Matthews v. Leapingwell.*

Page 912

2. And *semble*, that, in estimating such value, he is not entitled to take into the account lands held by him as tenant in common with another who is no party to the appeal. *Ibid.*

3. The landholders of a parish set up before the commissioner a *modus* of 2*d.* per acre; the asserted value of the tithes in kind payable under the award was 9*d.* per acre:—Held, that “the payment to be made or withholden according to such decision,” was, the difference between those two sums. *Ibid.*

## TRESPASS.

I. *For false Imprisonment.*

In trespass by *A.* and *B.*, his wife, against *C.* for a false imprisonment of *B.*, *C.* justified under an execution against the plaintiffs for costs in a former action brought by them against *C.*, alleging the recovery of the judgment, the issuing of the *ca. sa.*, its delivery to the sheriff, and the arrest of *B.* thereunder. The plaintiffs replied—confessing the recovery of the judgment, and the issuing of the *ca. sa.*—*de injuriâ suâ propriâ, absque residuo causæ*:—Held,

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that—as the judgment and writ were admitted on the record,—upon the warrant, and the arrest of *B.* under it, being proved by the plaintiffs, the justification was made out, without any evidence on the part of the defendants. *Newton v. Boodle.* Page 795

II. *Breaking and entering.*

*Aggravation.*] — *A.* hired of *B.* certain rooms in the house of *B.*, at a yearly rent, with the privilege of putting a brass-plate with *A.*'s name engraved thereon, upon the front-door, there to remain so long as *A.* should continue to occupy the apartments. The rent being in arrear, *B.* removed the brass-plate from the door, and refused to allow the plaintiff to have access to the apartments.

In trespass, charging that *B.* broke and entered the apartments of *A.*, and expelled him therefrom, and removed the plate, and seized and converted his goods, *B.*, amongst other pleas, pleaded that *A.* was not possessed of the brass-plate:—

Held, that the facts warranted the jury in finding that *B.* was guilty of *breaking and entering* the apartments; that the removal of the plate was properly treated as a substantive trespass, having been pleaded to as such; and that, in the absence of evidence to shew that it was affixed to the freehold, it must be assumed to be a chattel only. *Lane v. Dixon.* 776



### III. *Justification on Suspicion of Felony.*

A plea justifying the breaking and entering a house, without warrant, on suspicion of felony, ought distinctly to shew, not only that there was reason to believe that the suspected person was there, but also that the defendant entered for the purpose of apprehending him. *Smith v. Shirley.* Page 142

*And see GRANT.*

### TROVER.

#### *Effect of a Recovery in.*

1. A recovery in trover vests the property in the chattel in the defendant, as against the plaintiff. *Cooper v. Shepherd.* 266
2. In trover by *A.* against *B.* for a bedstead, *B.* pleaded a former recovery by *A.* in trover for the same identical bedstead against *C.*; averring that the conversion by *C.* for which that action was brought, was a conversion not later in point of time than the conversion mentioned in the declaration against *B.*, and that, before the conversion in that declaration mentioned, *C.*, being possessed of the bedstead, sold it to *B.*, who paid him for the same, and received it under such sale, and that the taking under such sale was the conversion complained of in the declaration against *B.*:—Held, that this plea was a good answer to the action. *Ibid.*

### VARIANCE.

*See AMENDMENT, I.*  
**BANKING COMPANY.**

### VENDOR AND PURCHASER.

*A.* paid a deposit upon a contract for the purchase of the lease, &c., of a public-house. It being afterwards discovered that the house was comprised with another in an original lease, under which the lessor had reserved a right to re-enter for breach of covenants in respect of either house:—Held, that *A.* was not bound to accept the title with an indemnity, but might recover back the deposit, with the expenses incurred in investigating the title. *Blake v. Phinn.* Page 976

### VENUE.

#### *Construction of Undertaking on bringing back.*

1. To satisfy an undertaking in such a case to give material evidence in *Middlesex*, the plaintiff, having, in order to prove the authorship, first shewn himself possessed of the manuscript in the county of *Surrey*, proved that it was by his direction offered for representation or sale in *Middlesex*, to the proprietor of a theatre there:—Held, that this, as evidence in confirmation of the previous proof of authorship, was sufficient evidence in *Middlesex* to satisfy the undertaking. *Lee v. Simpson.* 871



## VENUE.

2. In an action by *A.*, an agent employed by *B.*, to cause advertisements to be inserted in newspapers, evidence that *A.* gave orders to *C.* to insert such advertisements, is material evidence in the county in which such orders were given, to satisfy an undertaking upon bringing back the venue. *Parratt v. Benassit.* 884, n.
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## WRIT OF SUMMONS. 1043

WARREN.

*See* GRANT.

WITNESS.

*Competency of* — *See* EVIDENCE, I.

WRIT OF ERROR.

*Judgment on* — *See* PRACTICE,  
XII. 3.

WRIT OF SUMMONS.

*See* PRACTICE, I.

END OF THE THIRD VOLUME.



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